



CENTRE DE FORMATION ET D'ÉCHANGES EN MÉDIATION

FIRST TRAINING SESSION FOR THE OMBUDSMEN COLLABORATORS MEMBERS OF THE ASSOCIATION OF MEDITERRANEAN OMBUDSMEN

UNDER THE THEME:

**« COMPLAINT PROCESSING: STUDY AND
FOLLOW-UP »**



Rabat, 25th and 26th of March 2010

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PROGRAM

Coordinator: Ms. *Maria Del Mar España*, General Secretary of the Defender of the People, Spain.

Thursday 25th of March 2010:

Morning

9:00 am: Departure to the headquarters of Diwan Al Madhalim

Opening ceremony, headquarters of Diwan Al Madhalim

9:30 am: Speech of Wali Al Madhalim

9:45 am: Presentation of the training session and its goals by Ms. *Maria Del Mar España*, General Secretary of the Defender of the people of Spain

10:00 am: Return to the “Higher Institute of Judicial Authority”, location of the training Course.

10:15 am: Coffee Break

Working sessions

10:30 am: First session: Ways of complaints handling and admissibility

Expert: Dr Ivan Daniel Mifsud, Senior Investigating Officer, Office of the Ombudsman, Malta

11:00 am: Discussion

11:30 am: Second session: Addressing complaints and tools of mediation

Expert: Ms. Najoua ACHERGUI, Officer in the Section of Studies, research and Follow-up, Diwan Al Madhalim, Morocco

12:00 am: Discussion

1:00 pm: Lunch at the Institute

Afternoon

3:00 pm: Third session: Study Complaints, Follow-up and settlement requests in the Defender of People’s office of Spain.

Expert: Mr. Rafael Muguruza, Legal Advisor, Defender of the People's, Spain

3:30 pm: Discussion

4:00 pm: Coffee break

4:15 pm: Fourth session: Practical cases

Experts: Dr Ivan Mifsud, from Malta, and Ms. Najoua ACHARGUI from Morocco.

Friday 26th of March 2010:

Morning

9:00 am: Fifth session: Relationship between the Ombudsman and the administration:

Expert: Mr. Christian Le Roux, Director of Cabinet of the French Mediator

09:30 am: Discussion

10:00 am: Coffee break

10:15 am: Sixth session: Presentation of *Ms. Maria Del Mar España*, from Spain

“The Institution of the Ombudsman in the 21st century. The new technologies and new ways to communicate”

11:00 am: Seventh session: exchange of experience: Open discussion on and know-how.

1:00 pm: Lunch

Afternoon

Closing ceremony, headquarters of Diwan Al Madhalim

2:30 pm: Departure to the headquarters of Diwan Al Madhalim

2:45 pm: Assessment of the training course and reading over the final report by the Director of Cabinet of the French Mediator, Mr. Christian Leroux.

3:15 pm: Speech of Wali Al Madhalim

3:30 pm: Hand out of the training certificate.

3:45pm: Coffee break

4:15pm: City tour

First Session :

WAYS OF COMPLAINTS HANDLING AND ADMISSIBILITY

Expert : *Dr Ivan Daniel Mifsud,*
Senior Investigating Officer, Office of the Ombudsman, (Malta)

1. Introduction

I have been asked to speak to you this morning about investigatory methodologies, and my experience in more than ten years as Investigating Officer with the Parliamentary Ombudsman of Malta, apart from helping the Audit Officer of the Malta Environment and Planning Authority¹ and chairing the Prison Board of Visitors, which amongst other things receives complaints from people in prison.

After a brief reference to the Maltese Office of the Ombudsman,² I will talk to you present to you:

(a) the importance of understanding certain fundamentals in order to handle complaints effectively;³ and

(b) the importance of knowledge.⁴

I will then first share my thoughts with you about the personal qualities that are required of an effective complaints-handler⁵ and then proceed to investigatory methodology.⁶ The next part of my presentation is about ‘the importance of space to work’⁷ and I conclude⁸ with a reference to time and accumulated experience being the best teachers.

2. The Maltese Ombudsman

The Maltese Ombudsman follows the New Zealand model, which in itself was based on that of the Scandinavian countries. In other words, ours is the ‘traditional’ or ‘typical’ Ombudsman, entrenched in the Constitution, appointed by Parliament and accountable to the same Parliament, given all the tools required to monitor the government and investigate complaints in an effective manner (sufficient finances to run the offices, exemption from Data Protection restrictions which would otherwise hinder the collection of information, authority to appoint his own staff according to his needs, power to enter premises, power to request any documentation from the government, power to summon anybody for information purposes, discretion in accepting or declining complaints, etc). The legislator also built in sufficient safeguards to ensure that the Ombudsman while being given the tools necessary to operate,

¹ This is an Ombudsman-like institution set up to scrutinise the operations of the government entity in Malta responsible for planning and environmental matters, called the Malta Environment & Planning Authority (MEPA).

² Part 2, p.1.

³ Part 3, pp 2-5.

⁴ Part 4, pp 5-6.

⁵ Part 5, pp 7-10.

⁶ Part 6, pp10-15.

⁷ Part 7, pp15-16.

⁸ Part 8, p 17.

will do so in a fair manner (he must give reasons for not accepting to investigate a particular matter, he must keep all matters confidential and is bound by the professional secrecy, he must not have conflicts of interest, he must report to Parliament at least once a year through his annual report, he can only make recommendations, although there is no appeal from his rulings his operations are subject to judicial review if he exceeds his jurisdiction (*ultra vires*), he must inform the head of the department when he starts to investigate a complaint involving that particular entity, etc.).

The law (the Ombudsman Act, 1995, Chapter 385 of the Laws of Malta) covers all this in articles 1 – 21 and then jumps to ‘procedures after investigations’ (article 22 onwards). Interestingly the legislator had nothing to say about how to handle actual investigations, leaving this to the Ombudsman. There is one provision in the Maltese Ombudsman Act, which states that Parliament may ‘*make general rules for the guidance of the Ombudsman*’ (article 15) but no such rules have ever been issued.

So, armed with the tools given to him by the legislator, it is up to the Ombudsman to determine how to handle complaints. In Malta, the Ombudsman wrote a manual, a handbook on complaints handling. I still remember studying it at home, in my first days at the Ombudsman Office.

3. Understanding the underlying fundamentals

3.1. Understanding his function

Before one starts to handle complaints, and if the complaints are to be handled correctly, I think that the Ombudsman, or Investigating Officer, must be in possession of one important thing: he must know, he must comprehend, he must appreciate his function, what it is about, what his role is, and why he carries out this role. Unfortunately I have come across persons in Malta who did not satisfy this requirement. The result was that they could not, in fact they did not, operate effectively. Until some years ago we had a person holding a particular Ombudsman-like position (he was in fact one of Malta’s sectoral Ombudsmen, dealing with complaints in a particular sector). Quite a few years into his term, he publicly stated that he had not yet managed to comprehend what his role is. He seems to have remained in this state until his term of office was up. I think that, having played a key role in the administration of the entity he was now entrusted to monitor, he did not manage to overcome his personal conviction that the Authorities were there to be obeyed, not to be questioned! He never even grasped the basics, making such statements in his annual report such as that he is receiving less complaints as time goes by, but if people do not complain it was a good sign and means

that they are happy with the system! The reality of course was that people did not bother to resort to his services because they did not have faith in him and his performance. This has been proven by the fact that the number of complaints received by his successor are by far much higher.

3.2. Understand the notion of the government as a service-provider

What is there to understand, one may ask? For starters, one must understand that people finance government operations through the taxes they pay, and therefore since they are financing the system, they are entitled to a good return for their money. The Government must understand that it is there to administer the country in such a way that the Citizen benefits (e.g. the economy prospers, people have jobs, people live in a low-crime and secure environment, health services are adequate, etc). The Government is there to provide a service to the people, who are the service receivers, the clients. Good customer care is required and when a customer is not satisfied with the service he receives, he has the right to question this perceived failure on the service-provider's part. If, like the Maltese sectoral ombudsman I referred to earlier, one does not even understand this much, then he / she has a serious problem.

3.3. Understanding that complaining is healthy

There is more to understand. Complaining is not half as negative as the sectoral ombudsman I referred to, used to think. That Ombudsman did not understand that it was the peoples' right to complain if they are dissatisfied with a situation (in his mind, they were just grumbling, whereas they should just accept the authority's benevolence). Even more unfortunately he never grasped the fact that the administration benefits from complaints, and actually needs people to complain, because they need somebody external to point out any shortcomings and to suggest improvements.

Unfortunately more recently I witnessed a conversation between a colleague of mine (on the Prison Board) and the Director of the Prison. From the conversation it became clear that the person in the investigatory role felt uncomfortable asking certain questions, conducting an enquiry, and told the Director *'when I am questioning you I am against you, I mean, I don't have anything against you in person, but you know what I mean....'*. The Director balked at this statement, and so did I for that matter. The Director promptly told him *'no I never considered you to be against me just because you make certain enquiries; in fact I welcome your role because I like the fact that I have somebody from outside pointing out to me things that maybe I, from within, am unable to see even if they are under my very nose'*.

The Ombudsmen, their staff, and those in the public administration who are scrutinised by the Ombudsman must understand this role, and that investigating acts of administration might be inconvenient (e.g. replying takes time, and let's face it wouldn't it be more convenient for administrators to do what they like under a veil of secrecy?) but it's not exactly comparable with a detective investigating a murder and interrogating a suspect who could very well end up jailed for life! The Ombudsman and his staff are not enemies of the public administration. When they convey the complaint to the government entity, they are not on the citizens' side against the State, and are not doing so to hurt, to harm, the government. They are not against the government entity that they are probing. They are not a threat to the administration – the contrary in fact.

3.4. Understanding the philosophy behind 'recommendations'

Other basics require appreciation too. These include the importance of moving away from a Courts-based mentality. Unfortunately in Malta there is still this idea that the Courts are much more powerful than the Ombudsman, because the Courts can issue orders, whereas the Ombudsman can only make 'recommendations'. This is perceived as a sign of weakness on the Ombudsman's part. Once again, this is a mistake. The fact is that in mature systems of government, the Ombudsman is held in high regard and his word is given a lot of weight. In such systems it is presumed that the Ombudsman's recommendations are there to be implemented, unless grave reasons exist for this not to be done (e.g. the Ombudsman's recommendation is unreasonable and he refuses to detract from it). It must be understood that the fact that the Ombudsman can only recommend is a necessary balance built into the system. Apart from the fact that even Ombudsmen can make mistakes, there is also the fact that their powers extend to criticising policies and laws, and suggest changes to them. Now just imagine if the Ombudsman could order the legislator to change a law (instead of just recommend a legislative change)! He would be a super power. He would replace the government itself, including parliament. This cannot possibly be. So the Ombudsman's power must be limited to recommending remedial action, recommending changes to legislation, etc. Now going back for a second, I mentioned 'mature administrations implementing Ombudsman recommendations'. If the administration is not yet past the stage where it will capriciously disregard the Ombudsman, are we to believe that the same administration will obey the Courts? Maybe yes, maybe no. What are the effects of disregarding a court order? Contempt of court? Believe it or not I have actually personally handled a complaint where an administrative entity in Malta disregarded a court judgement. We considered this to be an act of bad administration and it took the Ombudsman over a year

to convince the government department to implement the court judgement (eviction of squatters from land owned by the complainant after the court ordered the return of the land from the government to the private owner; the government had not completed the expropriation procedures and the court ordered the return of the land).

3.5. Understanding one's role as 'monitor'

One must also understand his role. The Ombudsman, the Investigating Officer, is there to monitor, not to take the reins and run the place. As I stated at the beginning, I chair the Prison Board of Visitors⁹ (which amongst other things investigates complaints lodged by inmates). One of the first things I made clear to the Director of Prisons was that I am not here to try and run the Prison and will not interfere, try to take possession, try to take control of the prison management. I think this applies to the Ombudsman too. Monitoring and reviewing is one thing, giving advice is one thing, being bossy and possessive is a completely different one. The latter path leads to sure failure.

3.6. Understanding certain doctrinal concepts

Finally, one must also understand and appreciate certain basic concepts and what they imply, such as what is meant by 'discretion'. It is to be understood that reviewing a matter that falls within the authority's discretion does not imply substituting that discretion for your own. When one is faced with discretionary matters, one must understand that if a decision amounts to a reasonable use of one's discretion, then it is acceptable even if one does not necessarily agree with it. On the other hand, it is important to know and understand that, contrary to what was thought until some years ago (at least in Malta) it is possible to scrutinise discretionary acts (in the past it was not regarded to be possible and it was felt that all one could do was bow down when faced with a discretionary matter. Now we know that discretion can be questioned, mostly to establish whether a decision does fall within the limits of the authority's discretion and also to determine whether that discretion is being exercised in a reasonable manner. When making such evaluations, one must also keep in mind the fact that he / she cannot judge with the benefit of hindsight, but must imagine things as they were at the time i.e. one must not consider how something would be done if it was only just being done, but also one must put oneself in that person's situation, and imagine how, if he was that other person, he would have decided the matter at that time. Only then can the ombudsman and his staff determine whether a discretionary act falls within the limits of the powers granted to that administrator, and whether those powers were used in a reasonable manner. Of

⁹ We follow Ombudsman practices and procedures.

course this does not only apply to reviewing of discretionary acts: whatever the acts of the administration that one is reviewing, one must put himself in the administrator's point of view and see things how they were at the time the decision was taken, see things in context, and not now with the benefit of hindsight.

4. The importance of knowledge

A good Ombudsman, a good Investigating Officer, is one armed with knowledge. This is why Ombudsmen and Investigating Officers possess certain qualifications. Knowledge is not limited to knowing the Ombudsman Act. The more one knows about the law, and about public administration, the better. Let us imagine an Investigating Officer probing a case involving retirement pensions. The Investigating Officer presumably knows how to do his job, in the sense that he knows what an Ombudsman is, what an Ombudsman does and how he goes about it. But if he knows nothing about pensions, how far will he get? Not very far I'm afraid!

The best way to acquire knowledge is by keeping on with one's reading and research. I still remember, when I joined the Office of the Ombudsman, just after university, I went through this phase where I did not want to read anything apart from fiction books. My boss used to always find me (during break) reading either a newspaper, or a car magazine, or a fiction book. He used to tell me *'leave those Agatha Christie books alone, and read work-related topics'*. My personal thought at the time was *'what's he going on about?'*. You have to take it in context of course, I was enjoying my new-found, post-exam freedom. For the first time in my life I not only had a decent amount of money in my pocket, but also did not have to be troubled about tomorrow, about exams, and so on. No wonder I did not want to read annual reports of overseas ombudsmen in my free time! In time of course all that changed, and since then I have read for and completed successfully a PhD on Citizens' rights and the Duty of Care that the State owes the citizen. And even post-PhD I still do my reading, and writing too: I contribute to a free e-journal on citizens' rights called **StateCareAndMore.eu** (you may look it up on Google if you are interested). The more you know, the better you can carry out your work: knowledge helps you to not only understand scenarios but also to find resolve them.

In my opinion, one's compulsory reading must include 1. Local newspapers to get to know what is going on in the country, what the government is doing, what laws are being passed, what policies proposed, what the issues at the moment are, what the people are concerned about; 2. The Government Gazette in which one finds government announcements, government appointments, bills and acts of parliament, and related matters; 3. Local court

judgements, from which one can learn a lot. A lot of the issues which the Ombudsman deals with, can be dealt with by a Court. For this reason it is important to know how the Courts handle these issues. It is also important to know how the Court is interpreting legislation, because the Court, and not the Ombudsman, is the leader in this area; 4. Overseas court judgements are important too e.g. the judgements of the European Court of Human Rights, and of the European Union Court of Justice, to name but two; 5. If you are an Investigating Officer, what your colleagues at the Office are doing;¹⁰ one should not only immerse oneself in one's cases, but should also try to keep an eye on what cases colleagues are dealing with and how they are handling them; 6. What overseas ombudsmen are doing, how they are deciding certain issues. In Malta we tend to give a lot of importance to the UK Local Government Ombudsmen, because the problems they handle are very similar to ours. We also follow the cases of the EU Ombudsman, with whom in fact we work very closely, as a Member of the European Union. Even if the nature of cases he deals with are not as similar to ours as those of the UK Local Government Ombudsman, the manner in which the EU Ombudsman handles cases is interesting and one can learn a lot therefrom.

5. The personal requirements of an effective Ombudsman or Investigator

5.1. Introductory comment

Correct complaints handling requires that the incumbent possesses certain personal qualities. These include: good communication skills, a certain amount of charisma, good observation skills, patience, determination too. I shall describe these briefly, in turn.

5.2. Good communication skills

This is a must for any Ombudsman and his¹¹ staff. They must communicate continuously both with the administration which they monitor, and their clients who are not always the easiest people to handle. With the administration, one must build a good relationship, a relationship of trust. The administration must be told, and continuously reminded, that the Ombudsman is not their enemy, and that having an external entity to scrutinise you can be very useful. Furthermore, the complaint can be delicate and sensitive, and lets face it, not all administrators are as receptive as they should be. They must be brought aboard, on the Ombudsman's side. In Malta this happens a lot with Corporations and public companies. They tend to be headed and managed by people from the private sector, and in all

¹⁰ Hence the importance of communication between colleagues; we actually hold meetings periodically to discuss, ask questions, share experiences, etc. Sometimes it is tempting to skip these meetings and get on with our case load, but in the long run I do not think this is in the best interest of the Office.

¹¹ 'His' includes 'her'. Please note that except where specifically stated otherwise, the masculine gender includes the feminine.

fairness are very result-oriented. In the present economic climate, they are probably under even more pressure than usual to deliver, to keep the entities they operate afloat and as much in the black as possible. So we have people from the private sector at the helm of Malta's national airline, and of Malta's main electricity-providing Corporation, to name but two entities. Their interests are to introduce leaner practices, cut costs, improve efficiency, collect moneys due to them, and overall keep their entities' accounts as healthy as possible. Both were more interested in the price of oil than anything else.¹² Being so result-oriented, and coming from the private sector where one does what is required to reach one's goal (within the law of course, or at least that is my presumption) they were not at all impressed by the Ombudsman's notions of good administration, by the Ombudsman criticising them for not issuing calls for applications and holding interviews before appointing a new manager instead of just appointing the person they felt was the more suitable for the job; they did not like the idea of accountability, transparency, fairness, etc. The Ombudsman was met with replies such as *'how am I supposed to run a company with all this interference?'*. And then of course there are those who simply say *'the Ombudsman is a waste of time, I couldn't be bothered about anything he has to say'*. It takes good communication skills to get somewhere with such people.

One must also keep in mind that good communication does not only mean being a good speaker. It also means being a good, patient listener. You must be ready to listen too. The chairman of the company that asks *'how am I supposed to run a company with such interference'* is making an important statement, and having made that statement will want to talk about it. It is important to listen.

Listening to the general public, your client, is important too. Many people just want an audience. Sometimes by simply discussing a case the conclusion emerges alone, on other occasions it might not, but no matter the outcome of the case the complainant tends to be appreciative of the fact that you made yourself available and took the time to listen. Unfortunately most people are too busy, and this includes government entities. My personal experience is that people like to know that they are being given genuine attention, and that they are not being treated as *'just another case, another number'*. Obviously Ombudsman offices are busy places, just like government departments. However the Ombudsmen must not make the mistake that many government entities make, and they should always be reachable by their clients the general public, and must always find the time to listen to them. No matter how many cases pending one has, if you have a phone call or a meeting, concentrate on it; this

¹² Electricity is for the main part produced from oil in Malta, and airplanes obviously run on fuel.

does not mean that meetings and phone calls should last for ever, but at least give that person genuine attention.

5.3. Charisma

Charisma helps too, as well as patience and perseverance. People like a good speaker, but a bit of charm and humour could go some way. Obviously it depends on the situation. You are there to do your job in a professional manner, and people do not always appreciate witty comments. But sometimes they can help. I have one lawyer in mind, who I meet a lot because he is the legal representative of a number of public entities that I deal with. He plays very hard to get, by taking long to answer, ignoring deadlines, when he replies he will raise as many preliminary objections as possible – reasons why the Ombudsman should not go into the case- and finally when he gets down to replying to the merits of the case (sometimes he does not even get that far in one letter) you are bound to be faced with a barrage of intelligent sounding reasons why his client is in the right. When you call him to a meeting he will turn up, punctually, and raise as much resistance as possible. I am used to him now, but the attitude I took after I realised what his technique is, is to fight fire with fire. I have found that he appreciates a good humoured, light, witty approach, so I humour him, I reply to all his objections without fear, I show him that he is not intimidating me by his approach and then, when he realised that I am playing his game, reversing the tables onto him so to speak, then he changed his attitude and got down to the actual business. On one occasion it took me three letters and two meetings to get to that stage with this particular lawyer, but now we joke at meetings and reach a good compromise on things. One time I actually went to a particular local council's office instead of asking them to come to me (he is their lawyer so he was there). He told me '*you did like Mohammed, going to the mountain when the mountain did not go to him*'. My instant reply was '*Mohammed was a very practical person*'. He liked my reply and, while presenting his clients' case and defending their rights and interests, as it is his job to do after all, we had a very productive meeting.

5.4. Determination

Determination is sometimes required too. I needed this with the Chairman of a particular entity shouted his head off at me over the phone. I found out later that his 'technique' is to try and intimidate people. I let him shout as much as he liked, and when he felt that he had had enough, in as composed a manner as I could possibly muster I told him '*can I speak to you now?*'. He then let me talk and we sorted out the issue. Since then I have met him on a number of occasions (work-related) and he has never tried to shout at me again.

5.5. Patience

Patience. You have to be patient to deal with some people. This probably goes more for the general public than with the government entities. Not only are you dealing with people from all walks of life, but you are dealing with aggrieved people, who due to their aggravation might not be exactly reasonable in their requests. There is also the fact that the Ombudsman tends to cater for the lower strata of society, because the upper ones have money and go straight to their lawyer, or have contacts and go straight to their MP if not to the Minister. You will have to deal with old people as well as young, dirty people as well as clean, illiterate ones too. Not everybody keeps appointments, or asks for them either. Some people just turn up, unannounced, and will expect you to be able to see you. They will come up with excuses that I have always hated such as *'I was running errands in the area and so I thought I would come over to you to see how my case is going'*. I have dealt with dirty people, one of the worst being a case of a man who turned up without an appointment smelling of garlic. He told me *'I was eating garlic by the sea, thought about you, packed my things and came to speak to you'*. Apart from his disturbing me because I planned my day and he upset my plans, he had a terrible smell of raw garlic. I tried to keep as far away from him as possible while talking to him, but with every step back I took he took one forward to approach me!

5.6. Good organisation

Ombudsmen and Investigating Officers tend to be very busy. Everything has to be done, and quickly, since one of the advantages of the Ombudsman remedy is that it is a quick remedy. One of the Ombudsman's advantages over the Courts is that cases are resolved quickly. If they are not resolved quickly then the Ombudsman loses his competitive edge. To get through a big caseload, and to see to all the additional obligations too, requires organisation. Files cannot just be left there to pile up, or forgotten, to be 'discovered' as a later undetermined point in time. This would be bad practice, and an entity set up to promote good practice must set the example! Deadlines must be set, and met. Cases must be seen to quickly. New cases must be acknowledged practically immediately and, if they do not require much work, for example if a case is out of the Ombudsman's jurisdiction, then these must be the first cases to be handled and completed. One's time must be divided between the various duties and obligations e.g. by trying to spread out one's appointments and meetings to leave time for the desk work, etc. Otherwise the people will become dissatisfied, and the office's reputation will suffer. The Ombudsman cannot afford this; if his words are to be listened to and his recommendations implemented, then he must work hard to earn and retain a good

reputation. Let's not forget that he wants his recommendations to be implemented, at least for the large part! He cannot afford to not have a good reputation!

6. Complaints handling methodology

6.1. Discretion accepting complaints

Ombudsmen tend to take on issues either after complaints are received, or after they are brought to their attention, usually by the general public. Ombudsmen tend to enjoy a discretion, having the power to decide whether or not to go into a particular matter. Obviously nobody is going to compel them to go into something of their own initiative, but when it comes to complaints lodged by the general public, even here the Ombudsman is not *obliged* to accept a complaint for investigation. Of course he is not above the law, and is in fact bound by it. For example, the Maltese law states that the Ombudsman may refuse to investigate a particular matter on one of a number of particular grounds, such as if the matter is time-barred (6 months in Malta's case) or out of the Ombudsman's jurisdiction. The Ombudsman can refuse to take up issues on such grounds, but is obliged by law to give the complainant reasons for his decision. So, for example, the Ombudsman cannot say '*I don't want to see your case*' but must tell the complainant, for example, '*the complaint is time-barred*'. There is that built-in element of accountability. On the other hand, in certain circumstances, the Ombudsman does not enjoy the luxury of choice and discretion. The law (in Malta's case) states that Parliament may refer a petition to the Ombudsman for his consideration, or the Prime Minister may refer a particular matter to the Ombudsman for him to investigate. When Parliament or the Prime Minister acts in this way, then the Ombudsman is obliged to look into the matter and deliver.

6.2. The role of the Public Relations Officer

Complaints as you know are either lodged in writing, or put in writing by the Office of the Ombudsman staff. Illiterate people have the right to complain too, and are in fact helped in formulating their complaint. Our Public Relations Officer actually writes complaints for illiterate or poorly literate people. Talking of the Public Relations Officer, in our case her job includes giving advice, that is, guiding people. For example it could be that the problem is not something that the Ombudsman can go into. E.g. people come telling us that they bought a television and it turned out to be defective. Obviously this is not for the Ombudsman to go into, so the Public Relations Officer tells them which government entity to resort to in order to safeguard their rights as consumers. The Public Relations Officer will also explain to people who come for advice, what the Ombudsman can and cannot do, how to lodge a

complaint, etc. She will also try and resolve small problems of them, if this is possible. For example a person came and told us that she applied for a grant from the housing authority to repair her home, but did not receive a reply. The Public Relations Officer phoned up the housing authority to enquire about the problem and manages to resolve the matter, through a phone call. It turned out that the file had accidentally been misplaced. Being practical can take you a long way; time and resources are saved by reducing caseloads, and the general public is happy.

6.3. Understanding the complaint

When a complaints is lodged, it is important to ensure that the contents are clear, that the Ombudsman or Investigating Officer has understood what the problem is. If it is not clear, then one might need to phone up the complainant, or invite him / her to come over to a meeting. In Malta this is not difficult because the country is so very, very small and nowhere is far away from the capital city, where we are to be found. In the case of Gozo, Malta's sister island, the Ombudsman actually goes himself periodically, to speak to people from Gozo about his work and their problems with the government, maybe to obtain further information and clarifications from them, maybe to explain to them a reply which they did not understand or did not agree with.

6.4. The next steps

Once the problem is clear and understood, it is then time to determine whether or not to accept the complaint for investigation. In Malta the grounds of admissibility are laid down in the Ombudsman Act, and include questions of jurisdiction,¹³ time frames,¹⁴ sufficient personal interest,¹⁵ exhausting ordinary means of redress available. The grounds are quite clear, at least in the Maltese context, precisely because the law is clearly laid out. We had a minor problem with the interpretation of 'tribunal' because certain entities are 'tribunals' of their very nature but not called 'tribunals'; we concluded that if a 'tribunal' is such out of its very nature, notwithstanding its nomenclature we will treat it as such. We also had, and still have an unresolved problem related to the Army, with Army Officers allowed to lodge a complaint according to the Ombudsman Act, but not according to the Malta Armed Forces Act! We are contending that since the Ombudsman Act is clearly worded, and was written way after the Malta Armed Forces Act, the former should prevail. We are in the process of sorting this out with the Army, and the Attorney General's Office.

¹³ Limited to government bodies, with those listed in First Schedule, Part A, excluded.

¹⁴ Art. 14 of the Act.

¹⁵ Art. 17 of the Act.

Speed is of essence when deciding the admissibility issue. If you are going to refuse to investigate a complaint, it is best to do so as fast as possible. If the days become weeks, and the weeks become months, it becomes less easy to refuse a complaint. 'Easy' in the sense that once time starts to pass, the complainant will form the impression that you are working on his / her case. It will not look good for the Ombudsman to send a letter after, say, a month, stating *'your complaint is out of jurisdiction'* or *'you lack sufficient personal interest in the matter'*. Of course, there can be reasons for the delay, valid reasons. It is possible for example that a letter is not clear and time is spent seeking clarifications; only when these clarifications are obtained maybe did one reach the conclusion that the problem is not acceptable for investigation. But at least in such cases the time lag is justifiable. What counts is that we don't sleep on our caseload, that we don't just leave new cases lying there to gather dust. That is where 'organisation' comes into the picture; you may recall my earlier reference to it, when I said that one of the personal requirements of an ombudsman is good organisational skills. The same goes for the Investigating Officers of course. They must be able to divide their attention between new cases, newly lodged complaints, which should be given expeditious attention (if not immediate) and older ones still being processed.

In Malta complaints tend to be either refused, in which case we inform the complainant in writing to this effect, or accepted for preliminary investigation, in which case we will send a letter to this effect to the complainant, and write to the government entity that the complaint concerns. At law we are obliged to inform the head of the government entity, when we are commencing an investigation. That is the rule, but I have to own up to having broken this on one particular occasion. I had a meeting with two particular complainants who alleged that they were unfairly treated in a selection process. They mentioned a very high-ranking officer within the entity they were complaining against, and assured me that he will back their case. It was obvious that he was the only one to back them, and the success or otherwise of their complaint depended on whether he would back them or not, give evidence before the Ombudsman in their favour, or not. So I made a deal with the two complainants, this being that before advising the Ombudsman on whether or not to accept a complaint for investigation, I approach this individual and sound him out. I did precisely that, I actually got hold of his cell phone number, made an appointment with him and discussed the case. I was very clear to him regarding what I was up to and also that I was not pressuring him in any way on whether or not to back the complainants' case or not. It turned out that he was completely unphased by the maverick scenario and backed the complainants' version in full. So I got back to the complainants, told them that I can start investigating, and wrote to the head of the government entity as per standard procedure. The head of the government entity

got to know what I had done and was not happy about it, but at that stage I felt that it was a practical choice even if not exactly in line with the wording of the law. On the other hand, to remain in line with the law, I did not use any of the information this individual gave me at that early meeting, during the investigation. I went through the ropes, and when the time came, summoned the individual again and then could use his evidence in a regular manner.

6.5. Requiring deadlines

Deadlines are important, if the Ombudsman is to mete out justice in an expeditious manner. For a very long time we used to impose them on the entity or individual that we are writing to. Some people simply will not answer unless you tell them *'please reply by such and such a date'*. On the other hand, in time I realised that some people resent it when you impose a deadline. So, in the interests of keeping good relations, I personally do not include a deadline in my letter. It is our philosophy at the Maltese Ombudsman Office, that government entities are to be allowed about three to four weeks to reply to a letter. When that time expires (we have a 'bring up' system which tells us when the time has expired; this could take many forms e.g. keeping a note in my diary, or through our computerised Case Management system, which caters for reminders, sort of like Google Calendar if you like) we send a reminder; at that stage I will impose a deadline, stating *'a reply by such and such a date will be appreciated'*. It usually works. If it does not, we can send a second, a third and then a final reminder. I rarely go beyond second reminder. I then call a meeting, or phone up the individual, or send that person an email. Depending on the case. Sometimes I go myself, sometimes it is the only way to get results. I have noticed that people like it when I go myself to their offices, and don't like to be asked to come themselves, summoned if you like. If I summon them they come, and cooperate, but they certainly like it if I tell them *'you came last time, I will save you the trouble this time'*. I myself like it too, because I know its a good PR, and also because it gives me an excuse to go out and change my environment for a few hours! Sometimes we call a person to a meeting but write that *'if your reply arrives before that date, you may consider the meeting to be cancelled'*. It tends to work too, defaulting public officers will usually submit their reply in order to save the time it takes to come to a meeting with the Ombudsman.

6.6. Writing styles

A brief observation about the importance that must be given to writing style. You must take the time to explain, using simple language; you should also take the time to correct any typing errors etc., because the presence of typing errors will give a bad impression to the reader. Furthermore, when writing to a government entity I personally always emphasise,

repeating several times in the same letter, that I am conveying the complainant's allegations, and not stating facts. Thus for example, as you know, the public administration is obliged to reply to letters. If a complainant tells me *'I did not receive a reply to this letter'* I will write to the government entity and ask them to reply. But I will not phrase it that way. I will not say *'you must reply to the letter that you did not reply to'*. I will say *'complainant is alleging that he never received a reply to his correspondence dated xxx copy enclosed; your sending me a copy of your reply to the enclosed letter would be appreciated'*. I will not judge them; for all I know the complainant may be lying that he never received a reply to his letter!

6.7. Gathering information

Obviously complaints handling is ultimately a question of gathering information, whether it is documents, or evidence. How this is done, and to what extent is a case-by-case basis. We have own initiative inquiries in which we felt it important, owing to the complex nature of the case, to plan the procedure of the investigation beforehand (create a sort of 'road map'), we have had cases which were so similar that we took them on a collective basis (Army promotions exercise), it is also possible for the Ombudsman to take on a mediatory role too (even if in Malta this is not done). One thing I have never done is get the government officials and the complainants to sit around a table and discuss things, see each others' points of view and try reach a compromise. However, my colleague has actually done this just a few months ago. It all depends on the case before you. What really matters is that you get all your facts straight, before deciding on whether to uphold or reject a complaint.

Regarding collection of documentation, in Malta the trend is to cooperate with the Ombudsman; when we ask for documentation and information we receive it. Sometimes we have to send a reminder, but that's about it. I remember only on one occasion in ten years that I had to go myself for a file. It involved the Planning Authority, and they were finding all sorts of reasons not to send us a file we requested as part of an investigation. I remember telling the Chairman *'coming Monday at 09.00 I will be at reception and if I do not find the file waiting for me, there will be trouble!'*. The following Monday I went, and sure enough the file was there. But now I must be honest with you. I did not have a clue about what to do if the file was not there. Start shouting, probably! Make a fuss no doubt! The good thing, I suspect, is that the Planning Authority did not have a clue either about what would happen if I did not find the file I asked for, so they made it a point to deliver. Sometimes you just have to take risks!

You also have to be persistent and determined, from beginning to end. Government entities tend to like to play it hard, and delay things, sort of try you out. You must show that

you are up to it. You cannot afford for example to drop a matter or take the easy way out just because the entity does not send in its reply, or does not send in a file. You must be ready to go the extra mile to collect the information. The same goes for Ombudsman recommendations: some recommendations are easy to be implemented, others meet with more resistance; it is the latter that prove your worth and the success of your institution; if the Ombudsman gives up at the first obstacle he will not establish his position as an authoritative, respectable one.

6.8. Concluding investigations

Once the information is gathered, it is time to conclude. How a case is concluded depends on the case. Sometimes a simple letter will do; sometimes an oral explanation. In other cases a report will be drafted. This could take the form first as a statement of facts, when it comes to complex cases we tend to first draw up a statement of facts and send it to the entities involved, for them to consider it and point out any factual shortcomings. We give them a deadline in which to reply, and then proceed to conclude the case. In other cases we just draw up a full report, which is more of a longer letter, and send it. In the past we used to send ‘preliminary opinions’ to the ‘losing party’ i.e. if we consider a complaint to be justified we will send it to the government entity and allow it a time in which to reply, after which time we will conclude the case. Nowadays we don’t do that, when a new Ombudsman was appointed, he abolished this system and resorted instead to ‘statement of facts’, which is not too far off in reality, except that the statement of facts does not allow the reader to comment on the Ombudsman’s considerations, but only on the facts. The Ombudsman felt that since the law allowed him power to decide a case, he should do so alone, but to avoid mistakes he allows the parties to check the facts first. This is one way of doing things. Personally I prefer the Preliminary Opinion method, because dissatisfied parties are going to get back to you anyway, but that does not make the other way less valid in my mind.

7. The importance of having space to work.

7.1. Physical space

By ‘space to work’ I am referring first of all to physical space. At the Maltese Ombudsman we have individual offices, individual room in which to work, answer calls without disturbing others, hold meetings, etc.

7.2. Mental space

But by ‘space’ I am also referring to ‘mental space’. The investigator must have ‘space’ to think. This means that he must not be over pressured and his caseload must be manageable,

if he is to give good quality work, do his reading and research, etc as well. He must also have time to think, to analyse, to process the situation. He must not be too rushed to conclude within a particular time-frame, or to not take too long investigating a case. Not all cases can be concluded quickly! I try to take as much time as a case requires, to go into the necessary depth that the particular case requires. Recently we were dealing with a charge by a local council (running into thousands of Euro) which the complainant was alleging that the local council had no right to. At a certain stage I received an email from the complainant stating ‘I am dropping the case; the local council has taken the necessary action in my regard’. I was tempted to close the case at that stage, but felt that the matter required further enquiry. I wanted to know *why* the change of heart, the local council had been insisting for a very long time that it was within the law and that the complainant is wrong, so why did they refund the money and drop all requests for payment? Before I got satisfactory replies (two months of writing and emailing went by) I did not consider my inquiries to be concluded and did not pass on the file to the Ombudsman for him to conclude. Obviously I could do this because I have the ‘space’ I need in which to operate, and also because in time I have learned (not without making mistakes) that it is better to let things take their course and go into the necessary depths, and give the Ombudsman a thorough report, than to rush through things, leave important aspects out, perhaps overlook important notions.

7.3. ‘Space’ in the sense of ‘distance’

‘Space’ also means ‘distance’ from the entities involved, and in particular from the complainants. Some complainants tend to be very convincing, together with being persistent in the matter. One has to be careful not to let this cloud one’s judgement. If you feel that this is about to happen, then take a break from the case. I am just concluding a case of this sort; the complainant was very polite, very meticulous, had the time to write and write and write even more. I am not saying that he was not at least partially right, but he wanted to meet me every time I got a reply from the government side, to discuss things. And he always managed to depict things in a particular way. So, what did I do? Of course I used to keep him informed as the case progressed, and used to give him meetings too. But every time, before taking the next step, after meeting this complainant, I used to leave the file there on my desk for about a week, and then revisit the matter. Obviously this meant that the complaint took longer to handle, but I think the time was well-spent, because the issues were so complex.

I think that it is important to be polite, friendly, charming too, but do not make the mistake of becoming chummy with either the government personnel, or the complainants. Otherwise your judgement might be clouded. Certainly, while being humane, and trying to

show understanding, do not show pity. I remember one case, one of my very first cases, where I was genuinely sorry for a person losing his job, and he abused of that sentiment, capitalised it, went quoting certain things to the Ombudsman which were not exactly what I intended, accused me of saying that I raised his expectations (when ultimately the Ombudsman did not uphold his complaint), etc. My Boss told me *'you see what happens if you pity somebody?'*. A lesson I learned and kept in mind.

8. Conclusions

Complaints handling is an art, which takes time to muster. Experience, like everything else, is the best teacher. The university books only teach you so much. How, one may ask, does one gain the most experience? Do the investigators specialise in specific fields and get to know their field inside out? This might be good, but will result in me knowing all about MEPA, the Army, the Police, and nothing about social security, tax, education, etc. On the other hand, if all investigators handle all the manner of cases, they will gain more of an overall view, but less of an in depth view. In our office in Malta, we have preferred the former, with each Investigating Officer dealing with the same entities (e.g. I deal with planning issues, the Army, Police and local councils). My colleagues deal with other subjects. That way I get to know certain processes in depth and can handle the problems better. On the other hand, there is the problem that I know next to nothing about for example handling tax and social security cases, which is not the ideal scenario either. So our Ombudsman likes to throw in a wild card occasionally, for example he will give my colleague a complaint involving the Police and give me a file pertaining to tax matters. She comes running to me with the Police file, and I do the same with her and tax files! The idea is to not get a feel in the other topics, which is not a bad thing in itself, in the complex specialised world that we live in.

Second Session :

تقديم الشكايات وآليات الوساطة

السيدة نجوى أشركي

إطار بشعبة الدراسات والتحليل والتتبع

:

كل الدول تقر بان هناك طريقتان للتظلم من القرارات او التصرفات الإدارية :

- طريقة إدارية: الاستعطاف الإداري

- : الطعن امام المحاكم الإدارية.

فإذا كانت مؤسسات الوسيط او الامبودسمان تعد الية حضارية لفض النزاعات الإدارية، فإنها لا تلغي الطريقة الاولى بل تعتبرها ضرورية (المساعي: المادة 35) اما اللجوء إلى القضاء فهذه المؤسسات تسعى إلى التخفيف من هذه المساطر التي تعد مرهقة للمواطن ومكلفة للإدارة.

سأطرق من خلال هذا العرض لموضوع تقديم الشكايات واليات الوساطة بالاعتماد على تجربة مؤسسة ديوان المظالم وذلك في إطار تبادل الخبرات والتجارب.

■ يمكن إجمالاً حصر دور مؤسسات الوساطة في ثلاثة ادوار:

1. معالجة الشكايات والتظلمات ؛

2. طلبات التسوية

(او التسوية الودية التي بحسب معنى الوساطة في مفهومها العام رغم قلة اللجوء إلى هذه الطريقة لكون اطراف النزاع ليسوا على قدم المساواة).

3. تفعيل القوة الاقتراحية

وتفاديا لتكرار ما سيقدم في العروض الاخرى، فسأقتصر خلال هذا العرض على استعراض طريقة تا الشكايات وقبوليتها كنقطة اولى، لنستعرض في نقطة ثانية اليات الوساطة بمنظور مؤسسة ديوان المظالم، علما ان القوة الاقتراحية تعد الطريقة الالبع لتقويم المساطر والقوانين والسلوكات التي تكون موضوع تظلم او شكاية.

I. تقديم الشكايات :

ا. طريقة تقديم الشكايات :

تتم إم مباشرة لدى مكتب الاستقبال او عن طريق البريد او الفاكس او بواسطة البريد الالكتروني.

ب. قبولية الشكايات (الدراسة الاولى)

تكون إم:

- بطريقة مباشرة بالنسبة للملفات الواردة عبر الاستقبال

- طريقة غير مباشرة بالنسبة للملفات الواردة عبر البريد.

ت. مبادئ قبولية الشكاية:

■ ان تكون مخالفة لضوابط القانون والإنصاف

■ التظلم من قرار او تصرف صادر عن إدارة او مؤسسة .

□الوضعيات الفردية بالنسبة للموظفين (وهذا مبدا تختص به مؤسسة ديوان المظالم).

نستنتج مما سبق، ان كل ما تنعدم فيه شروط الشكاية، فإن المؤسسة تقوم بشأنه بدور تواصلية وبيداغوجي حيث يتم توجيه وإرشاد صاحب التظلم إلى الجهات الإدارية والقضائية المختصة بالنظر فيها، كما يتم إطلاعها على المساطر (التي غالبا ما تكون معقدة ويصعب على المواطن العادي استيعابها) الواجب عليه مباشرتها للمطالبة بحقوقه.

ث. شروط قبول الشكايات (المادة 35)

لضمان مصداقية اولية ولو نسبية للشكاية التي ستواجه بها المؤسسة إدارات عمومية وتفاعيا لإغرافها بشكايات غير موقوف منها، إرتأى المشرع وضع شروط شكلية لقبولها وهي:

- ان تكون مكتوبة وموقعة من طرف المشتكي او نائبه ؛
- ان توضح المساعي التي قام بها المتظلم لاسترجاع حقوقه لدى الإدارة او المؤسسة المعنية؛
- ان تتضمن بيانا موجزا للأسباب المبررة لها ؛
- ان ترفق بالوثائق والمستندات اللازمة عند توفرها ؛
- الإدلاء بإشهاد الإنابة مصادقا عليه من طرف السلطات المختصة إذا تعلق الامر بمجموعة اشخاص؛
- تصريح يفيد بعدم عرض الشكاية على القضاء.

كما ان هناك شكايات افر المشرع بعدم اختصاص المؤسسة النظر فيها او معالجتها وذلك احتراماً لمبدأ فصل السلط وهي:

- الشكايات المتعلقة بالقضايا التي وكل البت فيها للقضاء ؛
- التظلمات الرامية إلى مراجعة حكم قضائي نهائي ؛
- الملتزمات المتعلقة بقضايا من اختصاص البرلمان ؛
- القضايا التي تدخل في اختصاص المجلس الاستشاري لحقوق الإنسان، حيث يقوم والي المظالم بإحالتها على المجلس.

2 - اليات الوساطة :

قبل التطرق إلى اليات الوساطة لا بد من الإشارة إلى ان مؤسسة ديوان المظالم تتميز بخاصية الجمع بين اليات عمل الوسيط وكذا اليات عمل الامبودسمان في مجال معالجة الشكايات الواردة عليها وذلك خلافا للمؤسسات الوساطة الاخرى، ولإعطاء فكرة واضحة عن هذه الخاصية سنتطرق في تحليل هذا الجزء إلى نقطتين:

اولا: الخصائص المرتبطة بالوسيط ؛

: الخصائص المرتبطة بالامبودسمان في مفهومها المؤسسي.

اولا: خصائص المرتبطة بالوسيط

تعتمد مؤسسة ديوان المظالم في مجال معالجة الشكايات على اسلوبين هما إما شكاية وتظلم او طلبات التسوية وسنعرض كل اسلوب على حدة.

1 الشكايات والتظلمات :

نقصد بالشكاية او التظلم كل طلب تقدم به اشخاص ذاتيون او اعتباريون إلى والي المظالم يلتمسون من خلاله رفع الحيف او الضرر اللاحق بهم نتيجة قرار صادر عن إدارات الدولة او الجماعات المحلية او اي هيئة تمارس صلاحيات السلطة العمومية، مخالفا للقانون ولمبادئ الإنصاف. ولكي تكون مقبولة يجب ان تتوفر فيها الشروط المنصوص عليها في المادة 35 من النظام الداخلي والتي سبق لنا التطرق لها في الجزء المخصص لقبولية الشكاية.

ب - مسطرة البت في الشكايات والتظلمات :

بواسطة رسالة الماموية، عين السيد الوزير الاول مخاطبين رسميين لوالي المظالم وهم المفتشين العامين بالوزارات ومديري المؤسسات العمومية وحدد لهم اجل شهر واحد قابل للتמיד بطلب منهم للإجابة عن شكايات المواطنين الموجهة لهم وهد التعيين سهل عملية التواصل بين المؤسسة والقطاعات المعنية.

وفور التوصل بجواب الإدارة عن الشكايات المعروضة عليها، يتم التأكد من صحة المعلومات الواردة فيه قبل تبليغ النتائج للمتظلمين. وفي حالة ما إذا تبين وجود تلاعب في الجواب المتوصل به او عدم وضوحه، يتم إما التعقيب عليه، او عرض الملف على انظار اللجنة المشتركة التي يحضرها المخاطبون الرسميون لوالي المظالم شخصيا، وهذه طريقة تهجها السيد والي المظالم قصد معالجة الشكايات المستعصية على دائرة الحوار ومحاولة إيجاد الحلول المناسبة لها. وفي حالات اخرى تتم مكتابة الوزير المسؤول عن القطاع مصحوبا بتوصياته واقتراحاته لرفع الحيف والضرر اللاحق بالمرتفقين او عرض الامر على السيد الوزير الاول باعتباره رئيس الجهاز التنفيذي

ج - التقارير :

يرفع السيد والي المظالم انواع من التقارير :

■ التقرير السنوي الذي يرفع إلى صاحب الجلالة ويتضمن جردا لعدد وانواع التظلمات والشكايات وطلبات التسوية وما تم بشأنها من إجراءات ؛

■ التقارير التي تقدم للسيد الوزير الاول تشمل التوصيات العامة بشأن التدابير الكفيلة بإحقاق الحق بخصوص التظلمات المعروضة عليه واقتراحاته بشأن التدبير التي يجب اتخاذها من اجل تحسين اداء الجهاز الإداري ؛

■ التقرير الذي يقدمه للمجلس الاستشاري لحقوق الإنسان بخصوص القضايا التي تم النهوض بمده الحقوق.

2 - طلبات التسوية

1- :

كما نصت على ذلك المادة 2 من الظهير الشريف رقم 1.03.240 بالمصادقة على النظام الداخلي لمؤسسة ديوان المظالم، فإن طلبات التسوية هي الطلبات الرامية إلى طلب تسوية ودية عاجلة ومنصفة لخلاف قائم بين الإدارة وطالب التسوية من بين الأشخاص الذاتيين أو الاعتباريين الخاضعين للقانون الخاص.

فخلافًا للتظلمات والشكايات التي تستهدف الدخل لدى الإدارة قصد رفع ظلم أو حيف أو تعسف أو تجاوز مخالف للقانون ولمبادئ الإنصاف ناتج عن قرار أو تصرف صادر عن الإدارة، فإن التسوية الودية أو الوساطة التوفيقية تعد أسلوبًا متميزًا لفض الخلافات القائمة بين الإدارة والمواطن.

وفي هذا الصدد اصدر السيد الوزير الاول منشورا تحت عدد 2008/10 للسيدات والسادة اعضاء الحكومة يدعوهم فيه إلى حث مصالحهم المختصة على اللجوء إلى الية التسوية الودية والوساطة التوفيقية كاسلوب حضاري لحل الخلافات بهدف تشجيع السبل غير القضائية لحل النزاعات بين المواطنين والإدارة.

ب - شروط تقديم طلبات التسوية:

الشروط الواجب توفرها في طلبات التسوية هي نفسها التي حددها المشرع بالنسبة للتظلمات والشكايات، وهي شروط وإن كانت شكلية، فإنها تمكن من البت فيها بالجدية والمصادقية اللازمة، فمن الضروري ان يكون طلب التسوية مكتوبا وموقعا من طرف طالب التسوية او من ينوب عنه، او من طرف الممثل القانوني إذا تعلق الامر بشخصية اعتبارية، وان يبين الإدارة المعنية والاسباب المبررة لطلب التسوية ، كما يجب ان يوضح المساعي التي تم القيام بها والتصريح بعدم عرضها على القضاء وان يرفق الطلب بالوثائق والمستندات اللازمة، كما يمكن لطالب التسوية ان يعرض اقتراحه لتسوية الخلاف.

ج - مسطرة البت في طلبات التسوية :

- التبليغ: يتم تبليغ طلب التسوية إلى الإدارة المعنية قصد معرفة موقفها إزاء الطلب ويتم منحها اجلا اقصاه واحد؛
- ربط الاتصال بين الإدارة وطالب التسوية واقتراح الحلول الودية لتسوية الخلاف بينهما ؛
- يتعين على الإدارة إن تبين في معرض جوابها من يتولى النيابة عنها في جلسة التسوية الودية والالتزام .
- يتم توقيع محضر التسوية من الطرفين إلى جاني توقيع السيد والي المظالم او مندوبه مع تسليم نسخة من المحضر لهم .

الخصائص المرتبطة بالامبودسمان :

في مفهومها المؤسساتي

سنطرق في هذه المرحلة من العرض لنقطتين اساسيتين تميزان عمل الامبودسمان في مجال معالجة الشكايات والتظلمات وتنص عليهما مقتضيات النظام الداخلي لمؤسسة ديوان المظالم.

1 القوة الاقتراحية :

المشرع اراد من مؤسسة ديوان المظالم ان لا تكون فقط مكتبا للشكايات بل قوة اقتراحية من اجل اصلاح الإدارة والتشريع والقضاء وذلك برصد الاختلالات التي تعترى سير الإدارة من خلال شكايات وتظلمات المواطنين الموجهة للمؤسسة ورفع تقارير وتوصيات واقتراحات وملاحظات إلى السيد الوزير الاول بشأن التدابير التي يراها والى المظالم ضرورة لتحسين اداء الجهاز الإداري وإصلاح النصوص القانونية المرتبطة بها.

وكمثال على ذلك، تقدمت المؤسسة للسيد الوزير الاول بمقترح من اجل تنفيذ الاحكام القضائية النهائية الصادرة في مواجهة إدارات الدولة والمؤسسات العمومية التي تمتنع احيانا عن تنفيذها بحجة عدم توفرها على الاعتمادات المالية الكافية لذلك، وذلك بتخصيص بند في ميزانية الدولة لكل قطاع على حدة خاصة بتنفيذ الاحكام وقد تم إدراج هذا المقترح في الميزانية الإدارات والمؤسسات العمومية.

كما سبق للمؤسسة ان تدخلت بالإنصاف في شكاية عدد من العسكريين الذين حرموا من راتب المعاش بعد إحالتهم إلى التقاعد بحجة عدم إفراغهم للمساكن الوظيفية التي يشغلونها، حيث ان مؤسسة ديوان المظالم قدمت توصية بضرورة عدم الخلط بين راتب المعاش الذي يعتبر حقا للمتقاعدين وبين إفراغ المساكن الوظيفية التي يمكن للإدارة رفع دعوى قضائية بشأنها ضد المحتلين.

2- البحث والتحري:

تنص المادة 45 من النظام الداخلي على انه بعد فشل المساعي التوفيقية، ووجد والى المظالم او مندوبه في الشكاية المعروضة عليه ما يبرر إجراء بحث فيها فيمكنه القيام بكل التحريات الممكنة لتقصي الحقيقة بخصوص مدى صحة المعلومات والوقائع التي بلغت إلى علمه وتسجيل استنتاجاته.

كما يمكن لوالي المظالم اللجوء إلى جميع الوسائل التي يراها مفيدة وضرورية لإجراء بحث او القيام بتحريات بكيفية سليمة وموضوعية وخاصة الحصول على الوثائق اللازمة او الاطلاع عليها وتفحصها، كما يمكنه ان يحدد للإدارة المعنية اجلا اقصى لموافاته بالوثائق المطلوبة. وإذا تأكد لوالي المظالم او مندوبه بعد البحث والتحري في الشكاية المعروضة عليه صحة الوقائع الواردة فيها، يمكنه توجيه توصياته واقتراحاته وملاحظاته للإدارة المعنية ويطلب منها داخل اجل اقصاه شهر القيام بالإجراءات اللازمة لتسوية القضايا المحالة عليه وان يخبره كتابة بالقرارات التي اتخذها في

لكن مؤسسة ديوان المظالم لم تقم بعد بتفعيل الية البحث والتحري في الشكايات والتظلمات المعروضة عليها، وفضلت في الوقت الراهن الإعتماد على عمل اللجان المشتركة، التي تم خلقها بمبادرة من السيد والى المظالم، مع عدد من القطاعات الوزارية والمؤسسات العمومية قصد عرض القضايا المستعصية على طاولة الحوار ومحاولة إيجاد حلول منصفة بشأنها.

وقد سبق لنا في نقطة سابقة من عرضنا هذا ان تطرقنا بتفصيل للجان المشتركة.

Second Session :

ADDRESSING COMPLAINTS AND TOOLS OF MEDIATION

Expert : *Ms. Najoua ACHERGUI*

*Officer in the Section of Studies, Research and Follow-up, Diwan Al
Madhalim, (Morocco)*

General introduction

Two ways in repairing iniquity:

1.Administrative one

2.Judiciary one

The institution's mission

Is confined to:

- Examination of the complaints and grievances**
- Conciliatory and amicable settlements**
- Formulation of the proposal power**

1-Complaints Handling

- a. Ways in lodging complaints**
- b.Admissibility**
- c.Principles in admitting complaints**
- d.Conditions in accepting a complaint**
- e.Few exceptions mentioned by the legislator**

2. Mediation Tools

1/ Specificities related to the Mediator

2/ Particularities concerning the Ombudsman's institution

I. Specificities related to the Mediator

1.Complaints and grievances

- a) Definition**
- b) Procedure and Processing of the complaints and grievances**
- c) Reports**

2. Amicable settlements

- a) **Definition**
- b) **Conditions in handling amicable settlements**
- c) **Processing and procedure**

II. Particularities related to the Ombudsman's institution

- 1. **Proposal power**
- 2. **Investigation**

For more information

Visit our website: www.dam.ma

Third Session:

STUDY OF COMPLAINTS, FOLLOW-UP AND SETTLEMENT REQUESTS

Expert : Mr. Rafael Muguruza

Legal Advisor, Defender of the People's Office of Spain

1. GENERAL APPROACH TO THE SPANISH OMBUDSMAN MODEL

1.1 Field of supervision in Spain

The starting point is an overview of the general framework in which the Defender in Spain is parliamentary mandated to protect fundamental rights and monitor the Administration bodies.

Spain is a strongly decentralized country and this implies a diversified monitoring activity when dealing and managing citizens' complaints. There are three administrative levels that can be supervised (plus the corporative organizations responsible of public services) and accordingly many complaints may be referred to different levels.

Here is also necessary to mention the parallel activity of regional/autonomous Ombudsman institutions in several Autonomous Communities. The Defender collaborates with them and cooperates in dealing with complaints referred to a same administrative body.

The general characteristics of the relationship with the judicial power in Spain have to be also briefly commented for better understanding the typical difficulties arisen when studying a complaint and deciding about the admission or the beginning of enquiries.

1.2 General activity in the Spanish Defender of the People

A reference to the main statistical data of the Defender's recent reports will result useful to understand better the working load usually managed by the Institution's services.

2. ADMISSION OF COMPLAINTS. STUDY AND ANALYZING

2.1 Causes of non-admission: formal and material

Once the complaints arrive, they are registered and classified to the competent department, where the admissibility process starts and the analysis of the facts put in question by the citizen/s.

There are different kinds of causes of non-admissibility, ones foreseen literally in the Defender's Law (especially formal causes) and others less specified in the regulations but equally derived from it.

2.2 Broadening information and "pre-admission" cases

The Areas may decide if there is a need of asking for more information, and then request it to the complainer. A variable period of time is offered to complainers for the reception of

additional information. Indirectly, this procedural step may be used also to confirm the complainer identity.

In the same way, a decision can be adopted to request administrative body previous general information about a particular situation expecting to clarify the facts shown in a complaint: the complaint is not admitted yet and so it is expressed to the Administration in the request.

If a complaint is admitted it is the time to decide the special body that must be requested and, if so, other bodies to address all the petitions simultaneously.

3. RESEARCH

3.1 Initial and broadening official reports

As a result of the first studying process the advisers propose the items that must be reported, considering the complainers' allegations but also other issues deduce from the analysis of the facts. The Defender or Deputies address the information request to the responsible authority at the body concerned.

A second studying process takes place when the official report is received.

The official information may be considered enough or insufficient; in case of insufficiency a broadening official report is requested. Depending on the sort of investigation several successive reports may be requested, extending a lot the enquiries in some cases.

If the official information addresses to the entire requested question then the Defender has to decide about the regularity or irregularity of the official activity and make a resolution or close the file.

3.2 Follow-up with citizens, complainers and third parties

All the complaint process is characterized by the continuous communication with parts concerned (step by step): complainers, administration and, in case, third parties.

3.3 Coercive requests and deadlines. Disobedience offence in the Spanish Penal Code

Here it will be explained how the Defender can compel the administration to answer his requests. The criminal legislation in Spain even states a special offence that may commit an administrative authority in case it refuses to collaborate with the Defender of People, obstructing his enquiries seriously and without justification. A comment on this legal provision will be offered.

4. RESOLUTIONS

4.1 Types and content

Resolutions are at the end of the complaints processing. Only a less part of complaints end in a formal resolution: recommendations, suggestions, and reminders of legal duties or warnings, as they are typified in the Defender's Act.

The content of these formal resolutions addressed to the Administration has been streamlined over the years and with the institutional practice.

A mention on the so-called "legislative suggestions" will also be explained.

4.2 Resolutions follow-up and parliamentary reports

Formal resolutions always go through a follow-up process, first with administrative body concerned and requested, and in other times with the higher authority responsible for the first one's decisions.

A distinction can be done with respect to the recommendations resulting from complaints and others drawn from thematic reports.

5. STUDY CASES

5.1 Individual complaint

5.2 Collective complaint

5.3 Ex-officio research

Fourth Session:

PRACTICAL CASES

Experts: *Dr Ivan Mifsud, from Malta, and Ms. Najoua ACHARGUI from Morocco.*

I have chosen a small number of cases intended to illustrate different facets of the Ombudsman:

1. The Ombudsman as upholder of Fundamental Human Rights, namely civil rights;
2. The Ombudsman championing principles of good governance;¹⁶
3. The Ombudsman as an alternative means of redress to the Courts.¹⁷

CASE ONE: The Ombudsman as defender of civil rights

i. Background to the case

Malta receives a lot of illegal immigrants from Africa. These people risk their lives crossing the Mediterranean Sea. Though they leave Africa intending to reach mainland Europe, some of them find themselves in the tiny island of Malta, in a detention centre and with little hope of commencing the lives they dreamed about and risked everything for. Once here they apply for asylum status. While some applications are accepted by the Refugee Commissioner, a considerable number are not. The latter are referred to as ‘rejected persons’, as opposed to ‘refugees’ and persons given ‘subsidiary humanitarian protection’. In accordance with the Refugee Convention, those granted refugee status or humanitarian protection acquires the right to remain in Malta, whereas those persons who are ‘rejected’ can be repatriated by the government at any time. This is not always done i.e. ‘rejected’ persons for different reasons, are not repatriated, or at least not repatriated within a short time. They are allowed to remain in Malta, with the authorities reserving the right to repatriate them at any time. In practice these people have remained in Malta for five, six, seven years.¹⁸ They are given an identity card and can even work legally. Like all other humans, they form relationships, and eventually some want to start a family, and marry too.

ii. The complaint received

¹⁶ In the EU, good administration is a fundamental human right (*Charter of Fundamental Human Rights of the European Union* article 41). Since the Treaty of Lisbon, the Charter is legally binding. Hence argument that the Ombudsman is a defender of human rights not only when dealing with civil rights (right to marry, etc) but also when dealing with and propagating principles of good governance and good administration.

¹⁷ There is a growing trend to try and resolve matters out of court, thus not only expediting justice and saving costs, but also making justice more affordable. It also serves to relieve the courts of some of their burden. The Council of Europe’s Commissioner for Human Rights, the Directorate of Human Rights and Legal Affairs, and the European Court of Human Rights have since 2007 jointly created a mechanism of continuous cooperation with National Human Rights Institutions (NHRIs) and Parliamentary Ombudsmen (in countries where there is no NHRI), to help achieve a better level of compliance with the principles laid down in the European Convention on Human Rights, and also help in the implementation of the Strasbourg Court’s judgments at a national level. This is being done partly out of hope that less applications will be lodged with the Strasbourg Court, which cannot cope with its case load (the ECHR has over 100,000 pending cases).

¹⁸ The influx of illegal immigrants by boat into Malta commenced around seven years ago.

The Ombudsman received a complaint, lodged by the Immigrants' Commission¹⁹ on behalf of a number of aggrieved 'rejected' persons, alleging that the Marriage Registrar was refusing applications for 'rejected' persons to marry. The complainant informed the Ombudsman that this was experienced in the following situations:

- A rejected person desiring to marry somebody enjoying subsidiary humanitarian protection;
- A rejected person wishing to marry another rejected person;
- A rejected person desiring to marry a foreign person living abroad, thus denied of the right to go and reside in another country with that person;
- A rejected person wishing to marry a local.

The Marriage Registrar was asking these persons to provide certain documentary evidence, proving their identity²⁰ and proving that they were not already married (in Malta you can only marry once). These 'rejected' persons could not produce such documents and hence had their applications refused. On the other hand, persons granted refugee status or humanitarian protection, applying to marry, did not face these problems; when they were unable to produce these documents, they were required to produce a copy of their 'PQ' this being the application for refugee status that they lodged with the Refugee Commissioner, on the basis of which they are issued with an official identity card. The Marriage Registrar informed the Ombudsman that in the case of Refugees and persons given subsidiary protection, this was enough, because unlike 'rejected' persons, refugees and humanitarian cases were in Malta legally²¹ and were also 'identifiable'.

The question of 'identifiability' of refugees and humanitarians, as opposed to 'rejects' was discussed with the Refugee Commissioner for Malta. The Refugee Commissioner informed the Ombudsman that all applicants filled in the same 'PQ' which included details such as name, country of origin, date of birth, etc. Applicants usually do not have any documents to serve as evidence of their identity, nationality, etc., and the Refugee Commissioner has no means to confirm or otherwise their declarations. So the declarations are taken at face value and the application for refugee status processed on the information provided. The Refugee Commissioner informed the Ombudsman that *'...where asylum seekers hide their true identity...in most cases this Office does not have the means to establish*

¹⁹ A non-governmental institution which, amongst other things, seeks to help such people. The Immigrants' Commission is hereinafter referred to as 'the Complainant'.

²⁰ E.g. official birth certificates.

²¹ Although they had not arrived legally, their stay had been legalized by being given refugee status or subsidiary protection.

the asylum seekers' true identities'. The Refugee Commissioner further stated that where persons have been granted protection, by no means can it be stated that they are 'identifiable' or any more identifiable than those persons whose applications are rejected.

From the meeting with the Refugee Commissioner it was clear that the Marriage Registrar's argument of 'identifiability' did not make sense. Having brushed aside the question of 'identifiability' the Ombudsman proceeded to consider the question of whether or not 'rejected' persons were 'legally' in Malta and how this affected their fundamental human rights.

iii. Relevant legal provisions

Art. 7(5) of the Marriage Act (Laws of Malta, Chapter 255) states:

'A request for the publication of banns shall not be entertained...unless and until, in addition to all other relevant information, there are delivered to the Registrar-

(a) the certificate of birth of each of the persons to be married;

(-----)

Provided that if it is shown to the satisfaction of the Registrar that it is impracticable to obtain a certificate of birth required to be delivered by this sub-article, the Registrar may accept instead such other document or evidence as he may deem adequate for the purpose of this article.'

Art 8 of the Marriage Act states that where the Marriage Registrar is of the opinion that he cannot proceed with the publication of the banns, the persons who wish to marry may apply to the Courts to issue an order.

Art. 38 of the same Marriage Act makes marriages of convenience (e.g. to obtain Maltese citizenship, etc.) a criminal offence.

iv. The Ombudsman's considerations

The Ombudsman is aware of the Marriage Registrar's powers and discretion, and also of possible concerns (e.g. the risk of marriages of convenience). On the other hand, one had to keep in mind the European Convention on Human Rights,²² articles 12 & 14:

'12. Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.'

²² ECHR.

'14. The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

The Ombudsman pointed out that right to marry is not absolute and '*national authorities may properly impose reasonable conditions on the right of a third country national to marry*'.²³ On the other hand, the Marriage Registrar's distinction, identifying a specific category of persons, denying them the right to marry, is discriminatory and incompatible with art.14 of the Convention, and unacceptable. The law in fact provided the Marriage Registrar with a solution, in art. 7(5) of the Marriage Act, quoted earlier. These people come from countries torn by war and civil strife, or possibly from countries which do not even have a registry and do not register births, hence the usefulness of this legal provision. The Marriage Registrar enjoys discretion, and is bound to apply it in the light of the ECHR, including art.14 i.e. in a non-discriminatory manner. The distinction between refugees and humanitarians on the one hand, and 'rejects' on the other, was not acceptable.

The Marriage Registrar stated that, while they were all 'irregular' immigrants, refugees and people with subsidiary humanitarian protection were in Malta legally, while 'rejected' persons were not. The Ombudsman did not object to the acceptance of the refugees' and humanitarians' 'PQ' and the immigration certificate / identity card which these persons are given, but objected to the treatment of 'rejected' persons. Apart from the discrimination between the different groups, to imply that 'rejected' persons being in Malta illegally did not oblige the government to recognize their fundamental human right to marry is fallacious. The mere suggestion that persons not in Malta legally do not enjoy fundamental human rights is simply unacceptable. The Ombudsman thus found in favor of the complainants, deeming the Marriage Registrar to be applying an arbitrary, discriminatory rule, not in compliance with the ECHR. He further commented that the court remedy was expensive and impractical, given that these were 'rejected persons', considering their means, etc.

The Marriage Registrar was notified of this Opinion, which has since been published on the Ombudsman of Malta's website.²⁴ In view of this, the Ombudsman notified the competent Ministry about the matter, and at time of writing²⁵ the matter has gone to the Office of the

²³ UK House of Lords, Lord Bingham's opinion in the judgement *Application of Balai and others*, 30 July 2008.

²⁴ <http://www.ombudsman.org.mt/index.asp>

²⁵ March 2010.

Prime Minister for direction. The Ombudsman recommended that where third country nationals (across the board) do not have the requisite documents, they should be made to wait for a pre-determined period of time before taking the oath under article 7(5) of the Marriage Act (thus ensuring that the marriage is not one of convenience). This recommendation, indeed the Ombudsman's position on the whole case, is still being rejected but he does not intend to lay this situation to rest, while the Complainant (the Immigrants' Commission) is also lobbying for a rectification of this blatant breach of these people's fundamental human rights.

CASE TWO: The Ombudsman championing principles of good governance

i. The initial complaint

The initial complaint was lodged by an employee of the Central Bank of Malta, who applied for an extension to her maternity leave, after the Government announced this possibility in the Budget Speech of 2007,²⁶ and had her application refused by her employer. The Central Bank of Malta claimed that this did not apply to it, because it is not part of the Public Service and at law enjoys autonomy in its operations. Article 3 of the Central Bank Act²⁷ was cited:

'(1) There shall be a bank to be called the Central Bank of Malta. The Bank shall form part of the European System of Central Banks as established under the Treaty...and shall assume all rights and obligations consequential to such status.'

The Central Bank claimed to only be bound by what is stated in the Collective Agreements reached between Management and the Unions.

With such a high level of autonomy being claimed, the Ombudsman decided to seek the advice of the European Ombudsman, to determine whether or not, and to what extent, the national ombudsman could intervene and investigate complaints involving the Central Bank. The EU Ombudsman's reply was that there is nothing in Community law to prevent national ombudsmen from investigating national central banks as regards the social rights of their employees.

The Maltese Ombudsman also pointed out that according to article 108 of the EC Treaty, national central banks enjoy autonomy and independence only *'when exercising the powers and carrying out the tasks and duties conferred upon them by (the) Treaty and the Statute of the ECB'*.

²⁶ The Government declared its intention to further family-friendly measures for all public officers, beyond what was agreed even in the collective agreements reached with the Unions. No written law was passed, binding the Central Bank to do the same.

²⁷ Laws of Malta, Chapter 204.

The Ombudsman acknowledged the Central Bank's autonomy from the Government, including the powers to recruit staff. However, the Ombudsman pointed out that Central Bank employees are 'public sector employees' and that the Bank certainly does not enjoy any form of blanket immunity, or '*splendid isolation, outside the jurisdiction of the country's judicial, legislative and administrative organs.*'²⁸ It is certainly not an EU Agency!

ii. The widening of the investigation, on the Ombudsman's own initiative

The Ombudsman decided to widen the investigation, on his own initiative, after receiving complaints from employees of other entities. These entities, like the Central Bank, do not form part of the Public Service. They enjoy independent legal personality and a certain autonomy from Central Government. There are many of them, some designated as 'Authorities' including the Malta Financial Services Authority, others as Corporations including the Water Services Corporation, and so on. One of the issues often brought to the Ombudsman's attention concerns recruitment procedures. It is often claimed that recruitment of employees had not taken place in a transparent manner and that this was done sometimes even without a call for applications and without a proper selection process. It was often claimed that vacancies were not properly regulated by a system whereby assessments could be verified; selection boards were claiming to not be bound to follow predetermined criteria to ensure a transparent selection process. These entities claimed that if they had to follow these procedures, their efficiency and competitiveness would be hampered. The Ombudsman took up this issue, not as a specific issue as such, but used it as an example, a test case to gauge the attitude of 'independent' public entities towards principles of good administration and good governance.

On his part, while the Ombudsman acknowledged the importance of efficiency and competitiveness, they were not a special reserve and the norms of public administration applied to them too.

The Ombudsman observed that this is confirmed by the Public Administration Act,²⁹ which deals with principles of public administration³⁰ and even applies to these entities, including the Central Bank of Malta for that matter. Thus for example article 3 states that '*Departments of government, government agencies and government entities are bodies which manage public resources and which provide services to the public or perform other functions on behalf of the State...*' while article 21 states that recruitment to public offices shall be made

²⁸ Quotation from the Ombudsman's published report, para 7.32. The report is also available on the Malta Ombudsman's website.

²⁹ Laws of Malta, Cap. 497.

³⁰ Including principles of good governance.

by competitive selection based on *‘the selection of the candidate best suited for the office on the basis of an assessment of the eligible candidate’s individual and relative merits against the requirements of that office.’*

iii. The Ombudsman’s conclusions

The Ombudsman concluded that *‘these autonomous institutions, whether set up by the Constitution or by law, should not lose sight of the institutional framework within which they are called upon to function... The independence and autonomy that they enjoy are not intended and should not be interpreted as affording them complete freedom to adopt administrative practices that do not reflect or that are even in contrast with the recognized rules of good governance that the public administration, which directly implements the policies of the executive, is bound to follow...they are an integral part of the public administration...’*³¹

The Ombudsman confirmed his respect for their independence in decision-making. For example, with regard to the Central Bank, its independence in monetary policy was to be respected. Nor did the Ombudsman state that Central Government policies and norms have to be adopted blindly. In fact, in regard to the Central Bank,³² the Ombudsman stated that the Central Bank had a right at law not to implement the family friendly measures, not outright as a matter of principle, but if the implementation would interfere with the exercise of its proper functions and obligations whether under national law and / or international conventions.

The Ombudsman further concluded that administrative practices and good governance principles had to be not only recognized but also welcomed, and furthermore adopted, and adapted according to the needs of the particular institution. The Ombudsman insisted that this was not a reduction in these institutions’ autonomy, but as *‘an exercise in self-regulation, inspired by their awareness of their raison d’être as essential instruments of an effective public administration that, in a modern society, thrives on a measure of devolution of power, necessary checks and balances as well as the efficient managerial, financial and economic management of the country’s affairs.’*³³

iv. the Ombudsman’s recommendations

The Ombudsman recommended that the Central Government and these independent authorities set up a consultative mechanism to promote good practices, high standards of good governance, ensuring transparency and accountability, while fully respecting the autonomy

³¹ Paras. 9.4 – 9.6 of the Ombudsman’s published report.

³² The initial complaint received concerning the refused extension to maternity leave.

³³ Para. 9.9 of the Ombudsman’s published report.

and independence these institutions enjoy. The Central Government could even use this mechanism as a forum to consult and sound out these entities before approving new measures.

v. reactions to this report.

The Ombudsman circulated this report amongst numerous entities. The reactions he received were mixed, depending largely on the function of the particular entity. Thus, for example, Air Malta plc³⁴ stated that the problem lay in the absence of clear distinctions between what is considered ‘public service’, ‘public administration’ and ‘public sector’. Air Malta for all intents and purposes was a commercial company operating in a difficult, highly competitive market; the fact that the government owned 98% of its equity had to be treated as incidental; the Company could not be burdened with conditions beyond what a private company was burdened with. On the other hand, Heritage Malta was more forthcoming and stated that it gave the topics of good governance, social measures adopted by Central Government, etc., high priority and strove to implement such measures insofar as the exigencies of the Agency permit.

CASE THREE: The Ombudsman as an alternative means of redress to the Courts

i. Background of the case

The case I had in mind involved damage to a Land Rover vehicle,³⁵ resulting from said vehicle falling into an open rainwater culvert by the side of a public road. Even the Local Council’s Executive Secretary admitted that the culvert presented a danger to motorists, and that work had to be undertaken to prevent a repeat of the action. The Land Rover incurred over 3,000 Euro worth of damages, while the driver and passenger are lucky to have survived: apart from falling about two meters’ depth and emerging unscathed, had the accident occurred after heavy rainfall the people in the car could have drowned (possibly trapped, strapped by their seatbelts).

ii. The applicable law

Art. 33 sub-art. 1 part (a) of the Local Councils Act³⁶ lists amongst the functions of Local Councils in Malta *‘to provide for the upkeep and maintenance of, or improvements in, any street or footpath not being privately owned...’*

Arts. 1032 & 1033 of the Civil Code:³⁷

³⁴ Malta’s national airline, 98% government-owned.

³⁵ Ombudsman reference Case C 0275

³⁶ Laws of Malta, Chapter 363.

³⁷ Laws of Malta, Chapter 16.

'1032(1) A person shall be deemed to be in fault if, in his own acts, he does not use the prudence, diligence and attention of a bonus paterfamilias.

1033 Any person who, with or without intent to injure, voluntarily or through negligence, imprudence, or want of attention, is guilty of any act or omission constituting a breach of the duty imposed by law, shall be liable for any damages resulting there from.'

Art. 22(1) of the Ombudsman Act states that the Ombudsman may find, after an investigation, that the decision, recommendation, act or omission which was the subject of the investigation *'appears to have been contrary to law'*.

ii. The problem raised by the Local Council

The Ombudsman found for complainant, deeming that the Local Council in question was responsible for not having taken steps to eliminate the danger presented to the motorist by the open culvert. The Local Council reacted to this by claiming that this was an issue for the Courts to determine, and not the Ombudsman. The complainants, according to the Courts, should have sued the Council for damages i.e. should have instituted an action in tort. The Court is the proper forum to determine whether the Council is at fault, whether the driver contributed to the accident and if so to what extent, experts will be appointed to help the court decide such issues such as contribution, etc. These would have been decided according to court doctrine built over time.³⁸ The Local Council accused the Ombudsman of pretending he knows too much and of substituting the Courts, all the court experts, etc., with his own judgment.

iii. The Ombudsman's reaction

To this the Ombudsman retorted that his Office acts *'...in a complementary role to courts of law...(with) distinct advantages over a formal traditional legal system'*, not getting involved in resolving legal issues, but promoting the rule of law *'the foundations of ... (which) are the courts of law which provide the guidelines within which... (to) operate...'*, promoting good administration and effectively standing in the way of abuse of power by state organizations. He rebutted this argument by saying that he was not getting into legal matters such as contribution, liability etc., but stating as was within his powers, that the existence of the danger was obvious and manifest and that by not taking timely action to avoid such an accident the Local Council had not done its duty under art. 33(1)(a) of the Local Councils

³⁸ The longest chapters of my PhD thesis (chapters 6 & 10) deal precisely with the courts' doctrine on governmental liability. This is available online in the WIKI section of the free online journal that I am involved in <http://www.statecareandmore.eu/>

Act. The Ombudsman had every right to reach this conclusion, under 22(1) of the Ombudsman Act.

iv. Observations

The Ombudsman's claim that he does not get involved in resolving legal issues seems to be supported by article 22 of the Ombudsman Act, according to which the Ombudsman is entitled to find that the subject-matter of the investigation '*appears to be contrary to law*', but not to conclude that the subject-matter '*is...contrary to law*' as the Courts may do where an action for judicial review of administrative action is instituted. For this reason it is submitted that the Ombudsman may assume a role complementary to the Courts, deciding cases that could have gone to Court, provided that he does not get involved in legal wrangling. The Land Rover Case is a case in point. The Ombudsman held that failure to maintain a road in a good condition is an '*administrative shortcoming*' since according to the Local Councils Act, Local Councils are specifically responsible for the upkeep and maintenance of roads. The Ombudsman further concluded that such breach of obligations appeared to be contrary to law, in this case not only contrary to the Local Councils Act but also contrary to article 1033 of the Civil Code. It would have been a different matter if the Ombudsman had attempted to determine whether or not a government entity had acted with the diligence, care and attention of the *bonus paterfamilias* under article 1032, because such a consideration would have involved delving deeply into civil law principles and laying down a more definite interpretation of the law. Article 1033 involves no such considerations, since it specifically excludes considerations such as intent and negligence, merely stating that where there is a duty and this duty is breached, responsibility for the consequences follows. Hence, the validity of the Ombudsman's claim in Case No. C 0275 that the Local Council against whom the complaint was lodged appears to have breached its duties under the Local Councils Act and for this is liable for damages suffered by the complainant under article 1033.

Needless to say, the Local Council involved in Case C 0275 refused to implement the Ombudsman's recommendation. In due course, and following a number of similar investigations in which the entities involved adopted an attitude of resistance notwithstanding the Ombudsman's efforts to convince them to resolve matters extra-judicially, in June 2005 the incumbent drew up and published a Special Report about the matter. Since then, some have followed the Ombudsman's recommendation and paid redress for damages where cases were obvious, while others have resisted and compelled aggrieved persons to go to Court. The *Land Rover* case ended up in Court.

The Ombudsman still considers his role to complement that of the Courts. It is made clear to complainants that his Office does not *substitute* the Courts and emphasis is placed on resolving matters out of Court when these can be so resolved. Where a specific remedy exists, for example a right of appeal, the Ombudsman insists that it is availed of. With regard to the Courts and claims for compensation, the emphasis is on attempting to settle cases out of Court where they can be so settled. Where this is not possible, for example where a decision on a claim cannot be taken due to conflicting evidence, the Ombudsman will not pursue the matter further. Thus for example in Case No. B 0362 the Ombudsman informed the complainant that although he had no reason to disbelieve her version of events, he could not criticize the head of the government entity involved for not acceding to her request for compensation, since the evidence indicated that he had investigated her claim but found substantial evidence to the contrary. For this reason the Ombudsman advised the complainant to institute judicial proceedings, this being the only forum with authority to weigh the evidence and pass judgment.

Importantly, the Ombudsman is bound by law not to intervene when matters are in court.³⁹ This implies that the Maltese Ombudsman cannot take on a role akin to that of the French *Mediateur de la Republique* who actually has the power to intervene to resolve disputes that have been in court for a long time. On the other hand, the Ombudsman is entitled to claim that a matter seems to be contrary to law, not only because the Ombudsman Act gives him this specific power, but also because he has the credentials to do so: the Ombudsman Act itself⁴⁰ equates the Ombudsman's status with that of a Judge of the Superior Courts, and in fact pegs his salary, allowances and expenses to those of a Judge of the Superior Courts. This pegging is not a coincidence, but indicates his status and level of standing in the hierarchy of the State.

Overall conclusions

My conclusion from these cases is to remind you of what I stated in my first presentation on *Complaints handling and admissibility*. The Ombudsman has to deal not only with an array of complex issues, and for this reason requires wisdom and knowledge, but also requires determination to drive his position home against all resistance. Good communication skills are also a must, to bring doubters onto his side.

³⁹ Ombudsman Act, art. 13(5) '*The Ombudsman shall not proceed to investigate any complaint on the subject-matter of which proceedings are pending in a court or other tribunal, and shall suspend the investigation if any interested person shall file a demand before any court or other tribunal on the subject matter of the investigation...*'

⁴⁰ Art. 10(5).

Fourth Session :

حالات تطبيقية

: السيدة نجوى أشركي

إطار بشعبة الدراسات والتحليل والتتبع

كما سبقت الإشارة فالأجوبة المتوصل بها من طرف المخاطبين الرسميين لوالي المظالم بمختلف الإدارات والمؤسسات العمومية المعني بها يمكن أن تتخذ ثلاث أشكال، فهي إما أجوبة إيجابية تمكن المتظلم من خلالها من أخذ مستحقاته، أو أجوبة تواصلية وسميت هكذا لأن الإدارة المعنية شرحت موقفها من مطالب المشتكي والمبني على قواعد وضوابط قانونية، أو أجوبة سلبية تنهرب من خلالها الإدارة من تمكين المتظلم مما يطالب به. وسنستعرض أمثلة عن كل حالة من الحالات الثلاث التي ترد على المؤسسة.

1 الأجوبة الإيجابية :

تندرج في نطاقها حالة عدد من الأساتذة الذين يطالبون بتمكينهم من التعويض عن فترة التكوين التي قضوها بمركز التوجيه والتخطيط التربوي، وبعد مكاتبة المخاطب الرسمي لوالي المظالم بوزارة التربية الوطنية، أفاد في جوابه أنه تم تحويل المبالغ المستحقة للمعنيين بالأمر كل إلى حسابه البنكي، وقد تم تبليغ المعنيين بالأمر بالنتائج المتوصل إليها حيث بعثوا برسائل شكر للمؤسسة على الجهود المبذولة خصوصا وأن مشكل التعويضات عن فترة التكوين وجد طريقه للحل على الصعيد الوطني وليس فقط بالنسبة للذين قدموا تظلماتهم إلى ديوان المظالم.

2 الأجوبة التواصلية:

تدخل في هذه الخانة، حالة المتظلم م. ع على سبيل المثال الذي يتظلم من عدم تمكنه من الاستفادة من معاش الشيخوخة من طرف الصندوق الوطني للضمان الاجتماعي، فبعد مراسلة المخاطب الرسمي لوالي المظالم في الموضوع، أفاد في جوابه أنه يتعذر تلبية طلب المعني بالأمر لأنه لا يتوفر على عدد الأيام المصرح بها والمتطلبة

للاستفادة من المعاش وعددها 3240 يوما من الاشتراك، وقد تم تبليغ المعني بالأمر بالنتائج المتوصل إليها وذلك تفعيلاً للدور التواصلية الذي تضطلع به المؤسسة بين المواطن والإدارة.

فالإدارة تبني الأجوبة التواصلية على قواعد وضوابط قانونية مما يحول دون تمكين المتظلم من مستحقاته وهنا يأتي دور والي المظالم كقوة إقتراحية من أجل إصلاح التشريع والإدارة وكمثال على هذا نجد القانون المنظم لتصميم التهيئة حيث أنه ينص على احتفاظ الإدارة

المعنية بالقطعة الأرضية لمدة عشر سنوات دون تعويض مالكيها إلى حين إنجاز المصلحة العامة فوقها أو انقضاء الأجل المنصوص عليه قانونا وهذا إجحاف كبير بحقوق المواطنين تعمل المؤسسة جاهدة على تعديل النصوص المنظمة لقانون التعمير.

3 الأجوبة السلبية :

تتدرج فيها مثلا حالات امتناع بعض الإدارات عن تنفيذ الأحكام القضائية النهائية الصادرة في مواجهتها، وعند التوصل بمثل هذه الأجوبة، فالإجراء الذي تتخذه المؤسسة يكون إما التعقيب على جواب الإدارة، أو عرض الملف على أنظار اللجنة المشتركة مع القطاع المعني (وهذه مبادرة من السيد والي المظالم في خلق لجان مشتركة مع عدد من القطاعات التي تعرف أكبر عدد من الشكايات في مواجهتها قصد التشاور بشأنها وإيجاد الصيغ الكفيلة بحلها) أو مراسلة الوزير المعني أو السيد الوزير الأول. وكمثال على هذه الحالات نذكر:

حالة المتظلمة م . خ التي تطلب تنفيذ الحكم الصادر لصالحها والقاضي بتسوية وضعيتها الإدارية والمالية، وبعد مكاتبة المخاطب الرسمي لوالي المظالم أفاد في جوابه أنه يتعذر تنفيذ الحكم لأن المتظلمة أحييت على التقاعد، فتم التعقيب على الجواب المتوصل به على اعتبار أن الأمر يتعلق بتنفيذ حكم قضائي نهائي صادر لفائدة المعنية بالأمر ولا زلنا في انتظار الجواب.

4 طلبات التسوية:

رغم قلة اللجوء إلى هذا الأسلوب المتميز لفض النزاعات القائمة بين الإدارة والمواطن نظرا لكون طرفي النزاع ليسوا على قدم المساواة (الإدارة من جهة والمواطن من جهة أخرى) فقد توصلت المؤسسة منذ إحداثها بعدد من طلبات التسوية الودية، وسأعرض عليكم حالة الإدارة (X) التي طلبت من مؤسسة تسوية ودية مع أحد المتظلمين الذي يطالب بتنفيذ الحكم الصادر لصالحه بالرجوع للعمل، حيث عبرت الإدارة عن رغبتها في إيجاد حل يكمن في تمكين المتظلم من جميع مستحقاته وتعويضاته والاستفادة من المغادرة الطوعية عن العمل مع الاحتفاظ بحقوقه المعاشية شريطة التنازل عن جميع الدعاوى القضائية التي يرفعها ضد الإدارة، وبعد عرض موقف الإدارة على المتظلم رفض ذلك ، بموقفه متابعة إجراءات الدعوى القضائية.

فرغم فشل المؤسسة في هذه التسوية الودية، إلا أنني فضلت أن أطلعكم عليها لكونها سابقة حيث أن من تقدم بطلب التسوية في هذه الحالة ليس هو المواطن بل الإدارة نفسها.

Fifth Session:

RELATIONSHIP BETWEEN THE OMBUDSMAN AND THE ADMINISTRATION

Expert : Mr. Christian Le Roux
Director of Cabinet of the French Mediator

Essence of the Ombudsman's mission...

The essence of the Ombudsman's mission is to guarantee for all native and foreign persons or entities, public institutions and any other organizations with a mission of public service the right to good administration and effective access to rights recognized by law, with particular attention to those most vulnerable: the disabled, detainees, children, elderly persons, poor or migrant.

Re-creating the dialogue between citizens and the administration

Mediation is an alternative method of settling conflicts. It guarantees concrete access to rights and recreates the social link. Furthermore, it helps to fight against corruption and promotes ethics in the administration.

Reasons for the growing popularity of mediation

Mediation is experiencing a growing popularity due to the increasing complexity of the surrounding world. The current trend is to regulate with the help of order, law, justice in order to oppose the transgressions of commercial, criminal, health and other branches of law.

Regulation leads to inflation of rules, instability of legal standards, and multiplicity of procedures. Mediation, on the other hand, helps to restore the force of law and prevent the triumph of the law to force; it promotes dialogue rather than violence.

The right to good administration

The Marianne Charter for better reception in administrations - 2005

The Ombudsman fights against Legal insecurity resulting from regulatory instability;

- ❖ Excessive response delays, or even lack of response;
- ❖ Lack of information or orientation as well as insufficient explanation of decisions;
- ❖ Complex recourse systems;
- ❖ Inequitable handling of complaints by administrations;
- ❖ Lapses in the reception of citizens;
- ❖ Excessive payment deadlines (the State: a bad payer).

The Ombudsman in between the citizen and the administration

The Ombudsman's duty and mission is to restore dialogue between the citizen and the administration.

The Ombudsman explains the claims of one of the actors of administration and the decisions of the other in order to propose a solution that respects the rule of law.

Different levels of mediation

- ❖ Mediation between government officials, legal professionals and citizens - the heart of the Ombudsman's mission;
- ❖ Mediation between administrations that often work "vertically" and have problems with communication
- ❖ Mediation between different worlds with different languages and officials, academics, politicians, associations, etc...;
- ❖ Mediation in situations of the opposition of national standards towards the integration of international standards or the implementation of international jurisprudence.

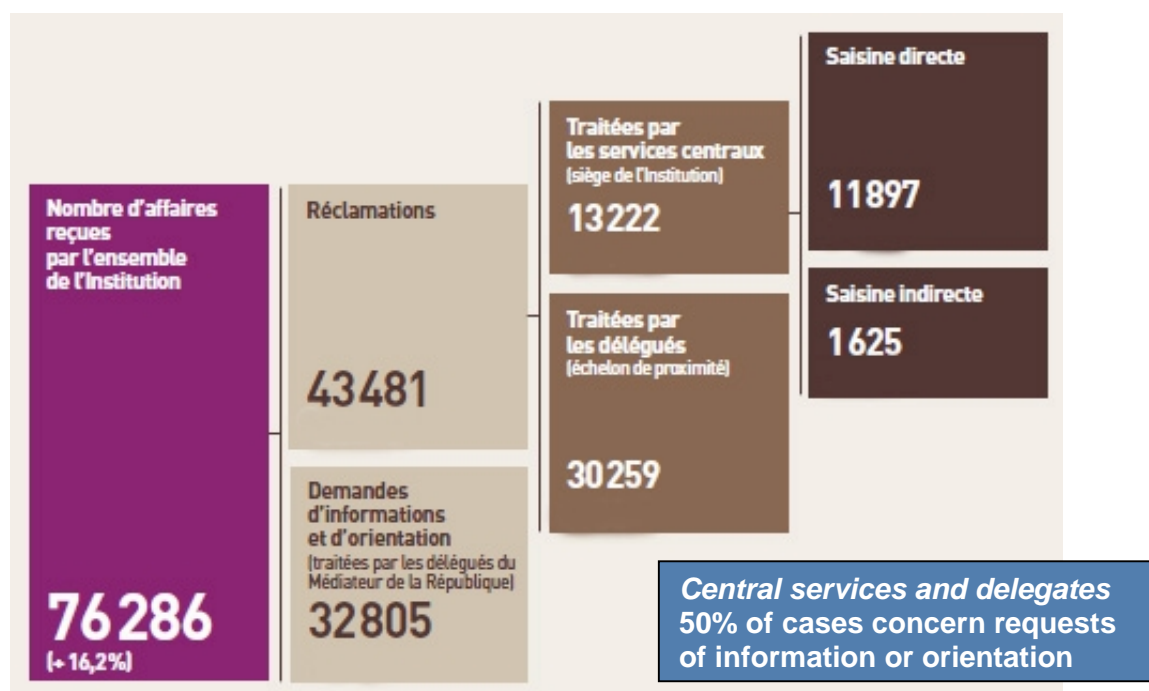
The French example

Created in 1973, the Institution of the Mediator of the French Republic is an independent body that uses its skills to assist citizens, individuals or corporate bodies free of charge, with a view to improving their relations with the administration and public services. It handles disputes on a case-by-case basis, checks whether the organisation concerned by a complaint has acted in line with the public service mission entrusted to it, points out existing malfunctions and restores the complainant's rights. When an administrative decision, though legally founded, violates human rights, the Mediator of the French Republic is empowered to make recommendations in all fairness. He may also use his injunction power when the State fails to comply with a court decision taken in favour of constituents. The Mediator of the French Republic equally has an important reform-proposal power with which he helps improve administrative and legal procedures so that the law can be adapted to social changes, and inequities stopped. The Institution owes its dynamism and efficiency to the quality of its employees at the headquarters, its national presence guaranteed by some three hundred delegates, its flexibility and networking. Appointed by decree of the Council of Ministers, the Mediator of the French Republic has a single, irrevocable and immutable six-year mandate. The Mediator of the French Republic is a member by right of the National Human Rights Commission.

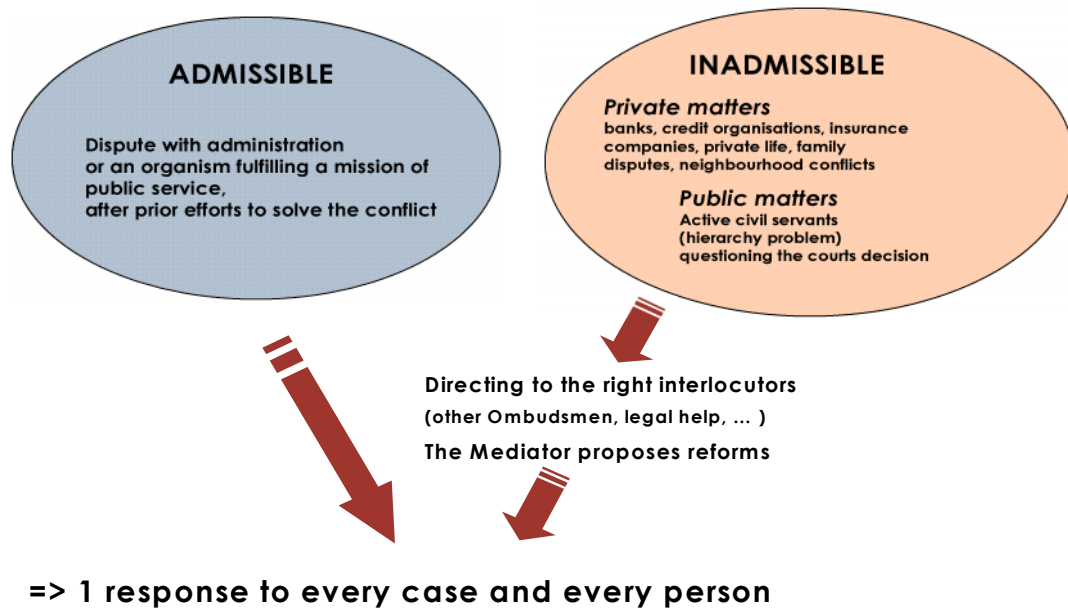
The Ombudsmen main **missions** are to settle disputes between citizens and the administration or public services, present reform proposals to the government and to the parliament, protect Human rights (The French Mediator is a member of the National Consultative Commission on Human Rights since 1993)

The Ombudsmen main **competencies** are recommending (repairing dysfunctions, recommendation in equity), proposing reforms, injunction, requiring inquiries and surveys from public authorities, performing inspections and applying sanctions

Figures of the year 2009



The Mediator – a link between the administration and citizen



10

The strong and weak points of the Institution

The **strong points** of the Ombudsmen Institution are independence and neutrality, the fact that the Ombudsman is equidistant from the executive, legislative and judiciary authorities and equidistant between the citizen and the state:

« nor the prosecutor of the administration, nor the advocate of the citizen »

Furthermore the Ombudsman Institution is transversal, confidential and free of charge.

The Ombudsman is an influential moral authority that has the capacity to appease the need for mediation, listening and dialogue

The **weak points** of the Institution are the limited power of coercion, the encountered problems with delays of responses from the administration and with access to documents. Furthermore, recommendation in equity should be reinforced in a way that the official who takes the responsibility for executing the decision should have protection.

Sectors of the Mediator Institution related to specialized fields of administration...

• *Admissibility*

Allocation to sectors, propositions of orientation in case of inadmissibility, handling urgent cases

- **General Affaires**

Urbanism, public works, public roads, public domain, environment, local public services, agriculture, education and recognition of foreign diplomas...

- **Civil Servants Pensions**

Former combatants and war victims, social protection of civil servants (unemployment, retirement, illness...)

- **Justice**

Civil status, nationality, rights of foreigners, French citizens abroad, Dysfunction of the public service and/or justice service

- **Social**

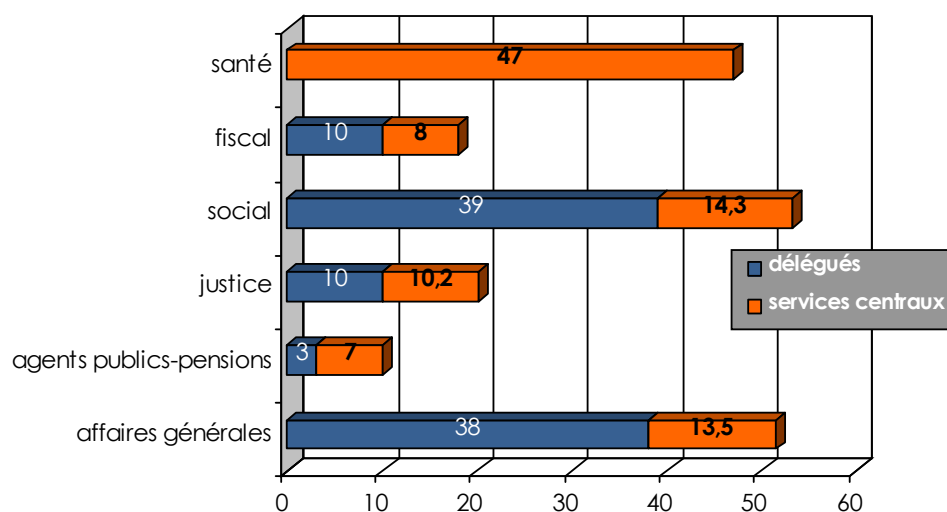
Social protection (family allocations, unemployment allocations, retirements, health insurance),

Social aid (disability, social minimum)

- **Health**

Sanitary surveillance unit, medical accidents, deontology and bioethics

Division of handled cases by field of administration - central services and delegates



*** The delegates do not handle the medical cases, those cases are always transferred to the central unit

Independence of the Ombudsman

The independence of the Ombudsman is not based on opposition, but on confidence, it is to build. The Ombudsman is neither on the side of the administration nor on the side of citizens.

The Ombudsman's independence is based on trust with the administration and political power. Therefore he can be the observer of society for the administration; he can ease tensions and propose amendments to improve legislation.

Working effectively with the administration

When an administration no longer makes out time to listen or reply to a citizen it immediately creates a feeling of injustice. Some social welfare organisations are fully aware of this and have started creating internal structures for receiving the general public, or mediation structures, so as to correct the drifts of “non-reception”.

The Mediator should rationalise and the search efficiency and rapidity and adapt ways of solving the problems depending on the handled cases.

Adapting ways of communication in a way that they depend on the case. Communication might take place by telephone or e-mail in minor cases, letters in the complicated cases if they require an analysis and a recommendation in equity or physical mediation for the very particular cases.

Working effectively with the administration

Typology established according to the dispute (Example of the social sector)

- matter in question
- nature of the claim
- level of collaboration with the administration

Working effectively with the administration (*example of the social sector*)

Examples	Absolutely lost	Lack of response	Questions the decision	Finds the decision unfair, demands an exception or a reform	Hyper procedural
Health insurance and related matters	Contact with the local delegate	Telephone or e-mail	E-mail	In principle, there will be no need to address the Mediator: the applicant has understood the reasons of the unfavourable decision, but nevertheless feels that his case is particular and therefore deserves an exception.	
Unemployment					
Retirement					
Social aide Social minima			letter		
Disability			letter		

Working effectively with the administration

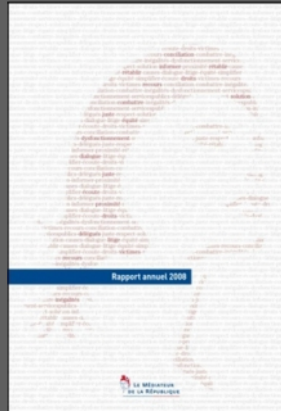
Technical meetings with the government in order to interpret texts, discuss legal evolutions worth considering, debate over encountered difficulties and ways of improving the ices

Furthermore, regular exchanges on studies and reforms should take place.

Means of communicating with the administration and the government



Free information journal
Mediator Actualities
Run : 20 000 exemplars



Annual report



**Website for debates with
and about the administration**

Means of intervention:

If the Ombudsman does not arrive at an accepted solution with the government, acting through dialogue, recommendations and proposals, he has **special powers** such as the means of access to information; the power of investigation; the power of injunction; the proxy disciplinary power and the power to request penalties.

Means of intervention...

The Ombudsman has the right to propose reforms to the government and civil service departments. The Ombudsman also has the right to make general recommendations concerning particular situations and recommendations in equity.

Furthermore, the Institution elaborates the annual report and special reports.

Conditions of the recommendations in equity...

The notion of fairness is very subjective, therefore in order to prevent the recommendations in equity from drifting into the arbitrary; a number of conditions must be met.

Firstly, the desire to respect the rule of law must not lead to opposing the will of the authority that created the standards.

The Mediator should ensure that the solution adopted in the name of fairness does not violate any rights of third parties and he should intervene only when the inequity created by the administrative decision is obvious;

When the Ombudsman recommends an equitable solution, it can in no circumstances create jurisprudence or a precedent. It is also important to underline that the official who has accepted to apply the recommendation should be protected by his superiors.

Examples of reforms proposed by the Mediator

- **Reforms to support**

- **rights of victims of corporal damage**
 - **medical accidents and the Kouchner Law**
 - **Introduction of a common methodology for all operations**
 - **Re-enforcement of the victims rights**
- **judiciary autopsies**
- **asbestos (improvement of the social protection of workers in contact with asbestos)**
- **civil status of children born without life**
- **precariousness of teachers without a secondary degree**
- **situation of children hosted by *kafala***
- **renewal of identity cards**
- **granting family allocation to children born of foreign parents in a regular situation**
- **improvement of social rights in regard to civil unions**
- **restoration of the « over-amounts » paid by the administration to civil servants**

- **Pending application decrees**

- compensation of victims of the hepatitis C due to blood transfusions

- regime of disability of civil servants

- nuclear tests

Mediator – in the heart of society

Improving the relation between the citizen and the administration

Network of correspondents

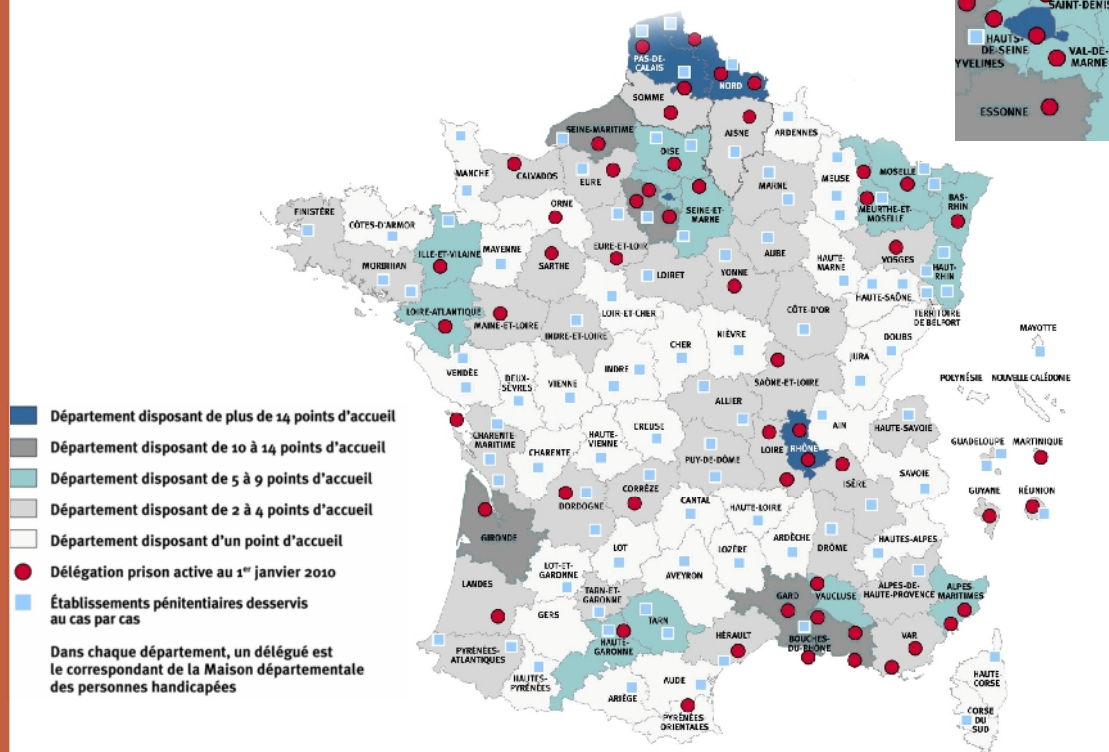
In order to facilitate the relation of the Ombudsman with the administration a network of correspondents has been set up. The correspondents work in and for the administration and are the contact persons of the ombudsman institution therefore can be reached directly.

The correspondent watches that the administration respects the law, looks for wise solutions, participates in the amelioration of the service... This direct relation can be established via conventions in order to remove all ambiguities.

The Mediator active in territorial administrations

- **281 delegates**
- **419 reception points out of which 275 in structures of proximity, often located in sensitive neighbourhoods**
- **Present in the overseas departments and territories**
- **95 delegates correspondents with the “Departmental Centre for Disabled Persons”**
- **149 delegates in 164 penitentiary institutions**
 - **60 sites with regular duty**
 - **104 sites with irregular duty**
- **since 2004**
 - **number of delegates : +12%**
 - **activity of delegates : + 24 %**
 - **120 supplementary reception points**

Network of delegates – 1st of January 2010



Delegates and networks

The Mediator of the French Republic is represented in the field by **delegates** - currently almost 300.

Their role can be summarised to:

- Listening;
- Explaining;
- Guiding;
- Intervening.

Delegates deal with 90% of the institution cases.

The activity of **delegates** is multidimensional:

- they play a mediating role of proximity
- they help humanize the extent of the law
- they participate in the evolution of administrative practices by their critical comments

52% of cases handled by the delegates are requests for information and orientation made by a population exceeded by the complexity of texts and administrative organization, form of dysfunction for the most vulnerable and the least informed citizens.

The recurrent difficulties ... efforts to pursue

For a good administration

- The European code of good administrative conduct
- The jurisprudence of the European Court of Justice and of the European Court of Human Rights
- The Marianne Charter/ The charter of the taxpayer (2005)

- obligation of response (motivated)
- obligation of information and orientation
- respect of the contradictory
- access to a judge
- reasonable delays
- neutrality and impartiality

Complexity and slowness (even absence) of the response	Rapidity and clarity of information
Juridical insecurity	Reliability of information and texts Qualification for normative production
Modality and delays of appeals	Homogenisation and clarification
Territorial inequality	Equal access and treatment on all of the territory
Reorganization of public services : effectiveness ? Evaluation ?	Accompanying changes : towards the officials and the public

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Pathologies of the public service: Internal dysfunctions or problems of the society?

- The administrated: user-consumer or citizen responsible and respectful?
- Force of the law and the right to force
- New fragilities and France of the invisible
- Neutrality of the public space and ethics of the public actor
 - secularism and respect for different beliefs
 - conflicts of interest
 - transparency
- The breach of equality

- Breach of the territorial equality
- Breach of social equality : end of collective hopes and individual survival
- Breach of the republican equality: social diversity? Equality of chances?

=> *Breach of solidarity and fragmentation of the society*

Quality of the public decision and its acceptance

- New approach of the authority towards the individual
- Medium and long term versus immediate
- Time for evaluation and time for application
- The principle of precaution
 - Management of careers and management of risk
- Culture of figures
 - Indication of truth or satisfaction of the hierarchy
 - What place for the qualitative?
- Devolution and decentralisation
 - Neutralisation or optimization of the public regulation

Stronger introduction of the human aspect and sense in the public services

In the time of mass treatment the society experiences a certain computerization and standardization which leads to anonymous treatment.

We should therefore reflect on whether technology is an advantage or a disadvantage?

=> Encouraging appeasement by listening and discussing

=> Developing accompaniment for all people

Reception: The key for entrance

One of the current difficulties is the embolism of emergency units that leads to queues at the reception desks and the overload of the telephone lines.

It is necessary to listen and orient as well as to anticipate frustrations.

⇒ *developing psychology, empathy, tools and training for the staff*

Merit of mediation

The strength of mediation lies in its capacity in cases of the failure of justice. Mediation is always an effective remedy - even when it fails, it restores confidence in the judge, who helps the parties to fully define their conflict.

Mediation is not an instrument of vengeance; it is the final stage of solving of the dispute.

Fundamental questions....

- ❖ May the Ombudsman limit his activity to ensuring proper administration that complies with the law?
- ❖ How to react in a situation in which the administration has applied the law correctly and, by doing so, created an unfair situation?

Sixth Session:

The Ombudsman Institution in the 21st century. The new technologies and the new ways to communicate.

Expert : Ms. Maria Del Mar España, General Secretary, Office off the Spanish Ombudsman

It is common practice to define and to name different historic periods with the most significant elements that characterize them. As such the 18th century, after the French Revolution, is commonly known as “The Century of Enlightenment.” And the 19th century is referred to as “The Century of Industrialization.” Following this methodology, we might define the 20th century as “the century of communication,” because during the last century some of the most important communications vehicles emerged and were spread among the masses like radio, television and the emergence of telecommunications networks linked to information systems.

Today, installed in the dawn of the 21st century--and at the expense of what might lie ahead for us in the future--I believe that we can provisionally call this century “the century of hyper-communication”.

The advancements made in computing, along with the development and implementation of new telecommunications systems—that is telematics—make tools like the internet, mobile telephony and personal computers available to individual citizens and society in general, providing a formidable transmission of information in real time.

It is in this aforementioned context that we have to operate, and in which we must proactively use all the systems and tools that technology provides us to do all types of activities. Moreover, we must use technology to communicate with society as a whole, especially in our institutions that are charged with the promotion, protection and shelter of the fundamental constitutional rights that are guaranteed to citizens.

Under this framework, the institutions of the Ombudsmen’s offices have two options: First, they can wait passively for citizens to register complaints at their offices. Or second, they can proactively anticipate citizens’ needs by offering creative and flexible services. I firmly believe in the value of the second option, and throughout my intervention today, I am going to explain why I believe this is so.

Once a basic decision is made regarding the philosophy of the Institution, a second decision about defining work processes and procedures logically follows: Should we imitate the Public Administration with its interminable bureaucratic procedures? Or should we provide the Administration with an example of how to work simply, effectively and transparently.

My theory is that technology and public administration should be at the service of citizens, and not the opposite. That is, citizens should not be at the service of bureaucracy.

Now that we sadly talk so much about gender based violence, we might also talk about institutional abuse of citizens by the Public Administration.

The citizen and the small business owner are harassed by the different Administrations to pay their taxes, to file their papers from birth until death, and to follow data protection, security and hygiene laws, etc...If the citizen is late with his obligations, he loses his rights. However, if the Administration is late, nothing happens--and that is not fair.

As such, first I will make a brief reference to the context of the use of new technologies in the Ombudsman's Office. Second, I'll explain the vision of the Spanish Ombudsman. And third, I'll talk about our communication projects.

1. The Use of New Technologies by the Ombudsman's Office

Citizens' universal use of new technologies has created new expectations regarding their relationship with the Public Administration and our institutions. We are talking about one of the greatest examples of participative democracy, transparency, and the application of the principle of equality.

In effect, access to public services via the internet has closed the gap between the rural and the urban. It has given a voice and a presence to the weakest groups, for example youth and the disabled. And, it pressures the Public Administration to resolve citizens' problems more quickly. The Administration can and should function efficiently. However, if its response is too late—and in this case we might talk about the Justice Administration—we cannot talk about true justice.

Citizens demand greater access to and better quality of public services, transparency and security in their transactions. They also demand simplicity and efficiency in the administration of those services.

In Spain--and I think that this is a thought that could easily be extended to all countries--we see an important difference between the computerization of the Administrations that we might call "collectors" and those that are "distributors." We can talk about two separate worlds: One, in which the Administration addresses the citizen to collect a tax, a fine or social security payments; and the other, in which the Administration offers a service, a subsidy or a benefit.

It is true that ICT (Information & Communications Technology) enables the generation of value added services through the intelligent management of information. Perhaps more important, it enables cycles of continuous improvement in our work and in our relationship with citizens by:

- Bringing our institutions closer to citizens through our websites and promoting their participation in a continuous, two-way dialogue.
- Managing internal processes effectively and efficiently with modern case management systems, and improving the interrelationships and interoperability among Administrations.
- Implementing the electronic case file, and making it possible for citizens to consult it remotely. In Spain, as of January 1st, 2007, Law 11/2007 (Telematic Access of Citizens to Public Services) requires that the Administration provides communication, electronic document processing and follow up services via the internet.
- Promoting electronic communication among Ombudsmen, as well as bilateral agreements with other Administrations to exchange information.
- Strictly enforcing the laws of personal data protection.
- And most of all, measuring the productivity of the quality and the management of services to drive a continuous improvement cycle.

Based on these elements, Spain has advanced its position considerably in the framework of E-Government. According to the most recent report from the United Nations (UN Global E-Government Survey 2010), we have moved from position number 20 in 2008, to position number 9 today.

In conclusion, and in an attempt to resolve some of the previously identified problems, I believe that the institution of the Ombudsman, with its innovative and special nature, can be useful-- especially during these times when societies are rapidly changing because of globalization, and in which the technical communication revolution has a principle role.

2. Our Vision

Now I will briefly summarize the main communication procedures that we use in the Spanish Ombudsman's Office. I will talk about three different areas of activity.

The first area refers to the rigorous norms that regulate our Institution and require that we disseminate information about our activities to the public.

The second area is related to the various systems that the Institution uses to transmit the information generated by its activities.

And finally in the third area of activity, I will describe the techniques that we use to understand the Institution and its functions; as well as the techniques used to facilitate citizens' access to the Institution.

2.1. Legally Required Information

The Spanish Constitution, in article 54, creates the institution of the Ombudsman's Office as a high commission of the Parliament established to defend the fundamental rights of its citizens. Its job is to supervise the Administration's activity and it reports directly to the Parliament.

To this end, the organic law that regulates the operations of our Institution requires the Ombudsman to elaborate a detailed annual report of all activities undertaken by the organization.

This annual report is initially presented by the officeholder of the Ombudsman to the Mixed Congressional and Senatorial Commission in charge of the relationship with the Ombudsman's Office. Later, the report is also presented to both Houses of Parliament—the Congress and the Senate—where it is subject to evaluation and analysis by representatives from various political parties.

Additionally, the Institution also elaborates monographic reports about specific socially worrisome questions that need to be brought to the attention of the Public Administration. These reports are also presented and debated in the Houses of Parliament.

The reports illustrate all the institutional activity of the Ombudsman, and they are not only distributed to the Parliament. They are also distributed to all media and communication outlets, other institutions, and the most important civil organizations such as union syndicates, consumer protection associations and NGOs. Moreover, the reports are available on the Institution's website so that they are widely accessible and they can even be downloaded by any citizen.

2.2. Common Communication Systems

As is logical in any type of organization, we have a corporate system designed to transmit information continuously about our activities to the whole of society. To this end, we use common techniques and existing means that can be summarized by the following:

2.2.1. The Institutional Website

Our Institution transmits more than 20.000 complaints annually. The internet is the channel that is increasingly used by the citizens. (1 out of 2 complaints is received via the web.)

Our internet site, www.defensordelpueblo.es, was born with a clear vocation to provide accessibility and to be user friendly. As such, it is designed specifically so that it can be used

by any citizen, including those that have some kind of disability. We have recently signed and agreement with CERMI, the organization that represents the Associations of Disabled People in Spain, so that there is a link from their web page with our on-line complaint form. This agreement eliminates physical barriers for the disabled, and helps them to use our Institution to protect their rights via the internet. I should also note that we have a 24x7x365 emergency service, which provides an Advisor who will travel to the scene of events to verify the acts and the possible negligence of the Administration in an alleged case of a serious and urgent violation of human rights.

In 2005, our institutional website obtained third position in the ranking of a group of websites analyzed in a study, “Inter-sectorial Website Accessibility”, from the Observatory of Information Accessibility of disc@pnet.

Moreover, since 2007 we have been introducing new elements for greater accessibility, as our technical capabilities and budgets permit. These new elements are based on the “Guidelines for Accessible Content on the Web 1.0”, in the context of the Web Accessibility Initiative (WAI) from the World Wide Web Consortium (W3C). In addition we are evaluating web 2.0 capabilities.

With all of this, we have achieved an “AA” accessibility rating for the Institution’s subject matter sites and an “A” rating for the main site.

The website content is varied and includes, among other items: a description of the characteristics of the Institution, the law that regulates it, the competencies attributed to it, and the members that comprise it; as well as detailed information about the activities it develops, and a documentation system in which one will find all the reports and publications that we author.

It is also important to note that the site has various monographic mini-sites. Among them is one aimed at young people and their teachers, called “The Ombudsman in Class”. The content in this mini-site is designed to facilitate, in a simple and agreeable way, knowledge about human rights, the national and international institutions charged with promoting and defending them, and special references to the Ombudsman and its role in this area. In addition, the site provides didactic material via links with the webs of other institutions and organisms related to the diffusion and protection of human rights. I put this material at your disposal through our site, if it is useful for you.

In addition, our site has a technical procedure to create electronic complaints, via the Institution’s homepage, enabling a specific section called, “Complaints by Internet.”

With this application, a citizen can fill out a simple form and send his complaint, with or without a digital signature. This form is incorporated directly into our complaints management information system.

Currently, we have a very advanced study of a system that permits the citizen to access and to follow his complaint electronically. It is our intention to implement it as soon as possible.

Regarding the Institution's communication with the public domain, via electronic media, we have already integrated ourselves with the Public Administration's SARA network (www.060.es)

Concerning our compliance with the law of personal data protection, I should indicate that the Ombudsman approved and published an Internal Order to regulate the existing personal data files at the Institution in 2008. These procedures contain a description of the six files that we maintain at the Ombudsman's Office. In addition, they meet all the relevant legal requirements, and they are available to whom it may be of interest. They include an internal procedure for removing data from the databases by express petition of the citizen. Finally, civil servants who have contact with personal data files have been trained in their obligations, during area specific meetings and in reference materials.

2.2.2. The Press Office

There is a Press Office in the organic structure of the Institution that continuously diffuses information to the media. Information related to our activity is distributed through press releases and through our monthly magazine, "The Ombudsman Update." Additionally, the Press Office organizes press conferences, appearances and interviews with the officeholder of the Ombudsman and the media.

2.2.3. Conferences

Qualified members of the Institution are repeatedly demanded to participate in congresses, seminars and meetings where they give conferences, speeches and presentations about our activities.

2.2.4. Academic Programs

The Ombudsman's Office collaborates with various national universities to organize and to teach courses about diverse topics related to our activity. These courses are open to the public in general. More specifically, courses disseminate the content of our monographic

reports with the participation of various groups including: subject matter experts, politicians, university faculty, and civil associations and organizations.

2.2.5. Studies and Publications

The Institution has an area dedicated to editing and publishing, not only the aforementioned reports, but also specific studies and publications related to the organization.

2.3. Main Promotional Activities

Lastly, I will briefly describe a series of activities that we undertake to promote a better and a greater understanding about the Institution of the Ombudsman.

2.3.1. Promotional Campaigns

Periodically, we elaborate pamphlets that provide a simple explanation about the institution of the Ombudsman, its goals, and the way in which citizens can access its services. These pamphlets are distributed to certain collective groups such as students and immigrants, and they are readily accessible on our website.

The pamphlets are translated to the co-official languages in Spain in the different territories of our country (catalán, gallego and euskera). In addition, they are also translated to the languages most used by our citizens from other countries such as: English, French, German, Arabic, Russian, Chinese, Rumanian and Bulgarian.

2.3.2. Organization and Patronage of Prizes

Every two years the Institution, in collaboration with the University of Alcalá, awards a prize to an Iber-American organization that has done significant work in the promotion, defense and application of human rights. The “King of Spain” prize, including monetary remuneration, is awarded by HRM (His Royal Majesty) in a solemn act of great public repercussion in our country and in other Spanish speaking nations.

In addition, and in collaboration with the Spanish Parliament, we award an annual human rights drawing prize to students in primary and secondary education. We use the winning drawing as the Institution’s Christmas greeting.

2.3.3. Signed Agreements

To promote our organization, we commonly sign agreements with educational entities such as: universities, organizations that work in specific areas related to the promotion and the defense of human rights, and associations that work with collective citizen groups like the disabled, among others.

Until now, these are the main procedures that we use in the Spanish Ombudsman's Office to promote and to communicate our activities.

3. Communication and the Institution of the Ombudsman in the Future

Now I would like us to use our imaginations and think about how we can be an example of innovation and modernization for the Public Administration, while bringing our presence and our services closer to citizens at the same time. In 2005, the Center for Sociological Investigation conducted a survey that concluded that the Spanish Ombudsman's Office is one of the most highly valued institutions by the citizens, along with the Royal Family and the Armed Forces.

However, only 1 out of 2 citizens knew about us. As such, it is clear that we still have important work to do ahead of us. It is here that we should use new technologies to bring us closer to the people.

On an informational level, I will tell you about some of the projects and dreams that we are working on in the Secretary General's team. Some of our projects are more developed, and others are in their infancy or only my personal desires:

3.1. **Implementation of an electronic register** that will facilitate global interoperability with the Administrations and the citizens, allowing them to present all documentation via internet and remotely follow-up on the status of their case. We will notably decrease complaint transmission time with electronic processing. This system will be implemented next month.

3.2. **The use of mobile telephony to communicate with citizens.** Our service contract with the Spanish company ,Telefónica includes the transmission of more than 20.000 notifications, via SMS to the citizen's mobile, communicating the resolution of his or her complaint.

A few months ago, I met the Mayor of Jun—a town in Granada that is a leader in the use of new technologies. 99% of the population has a mobile phone connected to the City Hall, and there is a pledge by the Mayor to resolve any routine complaint in fewer than 24 hours using mobile technology to send photos of broken outdoor furnishings or open pits in the street, etc.

Can you imagine the possibility that a citizen who is witness to the poor management of the Administration, an abuse of power, or an abuse by a civil servant could come to our institutions via his mobile phone with “tell-all” photos of the situation? It would be one of the clearest examples of real, participative democracy. This would be difficult to implement in an

institution with a large volume of complaints, however, I give you this idea as a symbolic example.

3.3. Institutional presence and communication via YouTube:

Some of you might think that this video distribution channel is only for young people and that an institutional presence doesn't make sense. However, traditional entities like the British Monarchy and the Vatican have a presence in YouTube. Why not the Ombudsmen Offices?

One might post not only institutional videos (introducing the institution, a summary of the Annual Report, presentation of monographic reports, etc); but also examples of mediation and best practices in defending human rights, as well as on-line educational videos providing methodologies for teachers.

3.4. Examples of mediation and reconciliation via the internet

On many occasions, the Ombudsmen do an arduous job with excellent professionals; yet to our regret, it is not recognized and broadcast adequately to the population.

In my opinion, the Ombudsmen should not limit themselves to propose and to inform about identified problems; but they also have the obligation to propose solutions to the Administrations and to mediate. It is often not a question of bad faith on behalf of the Public Administrations, but rather an excessive bureaucratization that create their "silo" behavior. Here is where the Ombudsmen can and should use their resources to mediate and to connect.

Our independent and neutral political position is the best foundation from which to propose solutions and ideas outside the political arena that truly benefit citizens.

Let me give you an example. Recently, the Spanish Ombudsman published a report about school violence, which denounced instances of school bullying, the loss of teacher's authority, and included various recommendations for Educational Administrations.

This report had important repercussions and generated a debate in our country about the need to provide school faculty with the status of civil authority and another series of measures. It was positive, but in the real day-to-day, teachers are lost and they do not have the means to resolve classroom disruptions effectively.

The Ombudsmen have the opportunity to offer their institutional and media platforms to the service of the community. As such, we are working with university faculty who are experts in teaching and mediation to provide teachers with: virtual classes about human

rights on YouTube, mediation examples for personalized guidance sessions, and pedagogical techniques to resolve conflicts.

This initiative has a minimum cost, and it can be tremendously profitable because it will benefit thousands of educational centers in our country.

3.5. **Finally, the use of social networks.**

All of us present see our children addicted to *Tuenti*, *Facebook*, *Twitter*, etc; but we don't think that these channels can be useful at the institutional level to broadcast an event, contact with the youth, or create a chat session on the internet that discusses a hot topic that we are working on, etc...

Last October, I attended the Annual Coordination Meeting of the Autonomous Community Ombudsmen in Seville. The theme of the meeting was "The Application of Technologies by the Ombudsmen."

As a novelty, the speeches and presentations were made available in real time on-line, and citizens were able to raise their concerns directly with the office holders of the Ombudsmen. It was a very positive experience.

In conclusion, I would like to apologize if I have been too forward in my proposals, but I think that the world is for optimists and it is best to propose ideal scenarios in order to move forward. I encourage you to promote all kinds of initiatives and I hope that we can share them in the next training conference.

Thank you for your attention, and I would be pleased to answer any questions or doubts that you might have.

Seventh Session

EXCHANGE OF EXPERIENCE

Coordinator: *Ms. Maria Del Mar España, General Secretary of the Spanish Defensor del Pueblo*



Turkey

In Türkiye, in order to improve human rights consciousness, to protect human rights, to investigate and examine human rights violations, to investigate and examine the social, political, legal and administrative reasons which cause obstacles for the enjoyment of human rights and freedoms and to develop proposals to solve them, (PHRP) and Boards (Provincial and Sub-Provincial Human Rights Boards) are established and have been carrying out their activities for over 10 years. Actually the beginning of the institutional study of human rights backs to 1991.

Prime Ministry Human Rights Presidency has activities for establishment of dialogue with civil community and public community that is required in human rights field. Especially in educational activities, the cooperation with civil society organizations was performed, mutual visits were organized, informational and material support was provided. Human Rights Presidency will keep on supporting for civil society organizations to be in direct communication for more effective dialogue about human rights.

Our presidency aiming at bringing human rights awareness to among community and administrative units gives importance to educational activities. Follows its activities in the collaboration with Human Rights Boards located in 81 provinces and 850 sub-provinces and tries to spread educational activities about human rights awareness.

By the regulation published at the Official Gazette dated to 2.11.2000, Provincial Human Rights Boards are established at the Provinces and the Sub-Provincial Human Rights Boards are established at the sub-provinces. Each Board under the chairmanship of the governor at the provinces and under the chairmanship of the sub-governors at the sub-provinces with a government official, consist of approximately 15 members including the mayor, the general council of the province, university, bar, chamber of medical doctors, chamber of commerce and industry, the school and family association, Mukhtar, local media, unions and representatives from the non-governmental organizations. There is no limitation of membership for the Boards and at some Human Rights Boards the number of members can rise up to 30. With this structure of membership the members are not appointed apart from only two.

The Human Rights Boards with the modest work that it has carried out for 10 years contribute to the awareness raising and human rights education of our citizens, the government officials and the Board members. With the steps taken during the recent years,

the Boards by putting emphasis ‘preventive’ activities before the violations occur, for instance the sudden visits that were conducted during the recent years to the detention centers contribute seriously to reducing the human rights violations to the minimum level.

In Turkey, Provincial and Sub-Provincial Human Rights Boards have the special position in human rights protection mechanisms with special structure, quality and development progress. Fast and complex socio-economical transformation of our country after 1980 made human rights “political agenda”, on the other hand reliable solutions for fundamental rights and freedom except of classical state structure were required. Clear and consistent problems, which could not be discussed before, request for new and detailed human rights added civil community organizations. Government, being “primary address” of request for human rights, adapted to a policy to improve human rights activities due to outer effects from European Union process and developed democracy movements in the world.

Our Presidency monthly monitors and evaluates the activities of Provincial and sub-provincial HR Boards that were organized on the basis of Regulation on 23rd December 2003 and numbered 25298 of Official Gazette through the sent activity reports and orients the HR boards with various educational and formational programs.

Another essential duty of our Presidency, being coordination body of process, is to develop the structure of activities by creating regular system and found collaboration ground for using possibilities and activities among public bodies. In this scope, our Presidency organized various coordination meetings, common education and conscious activities, and tangible results were gained in the scope of human rights materials that had been a problem in the past. On the other hand, sharing of the information about human rights activities with all organizations provided the development of these activities and brought serious advantages to create advertisement activities about international public opinion.

Our Presidency has got activities to investigate human rights’ abuse claims and take decision on them, prepare statistics about applications, analyze the level of human rights problems. The applications to Boards in 931 provinces and sub-provinces are converted to statistical data through forms. Data about abuses prepared by our Presidency, activity reports prepared by Provincial and sub-provincial Boards are carefully followed by pres and international public.

As I am a member of this “Violation Claims Department” we are responsible for examining and evaluating the applicants’ claims of human rights violations. We read the

petitions and decide whether there is a human rights violation or not. Then official correspondence process begins according to my decision. Moreover we are able to go and examine the violation in the places such as schools, hospitals, prisons... as part of our duty.

Hatice YÜKSEL

Prime Ministry Expert

Turkiye Prime Ministry Human Rights Presidency

Palestine

The Independent Commission for Human Rights (ICHR- Palestine)

The Independent Commission for Human Rights (ICHR), formerly known as the Palestinian Independent Commission for Citizens' Rights (PICCR), was established in 1993 upon a Presidential Decree issued by late President Yasser Arafat, in his capacity as President of the State of Palestine and chairman of the Palestine Liberation Organization..

Duties and Responsibilities

In accordance with the Decree, the duties and responsibilities of ICHR were set out as follows: “to follow-up and ensure that different Palestinian laws, by-laws and regulations, and the work of various departments, agencies and institutions of the State of Palestine and the Palestine Liberation Organization meet the requirements for safeguarding human rights”.

The Complaints

Complaints to ICHR are received in one of three ways:

- 1. Field researchers.**
- 2. Complaints made directly to ICHR.**
- 3. ICHR initiatives (Public Awareness and Training).**
- 4. Cases of violations of basic liberties of citizens by the PNA, by either security services or civil bodies.**
- 5. Cases related to the Security Services which cover arrest and detention without following legal procedures; torture and ill – treatment during detention.**
- 6. Cases of PNA's non-compliance with their legal obligations.**
- 7. Cases related to appointment and employment, in which legal procedures and principles of equity are not followed.**

Cases of discriminatory practices in applying the rule of law, based on considerations of sex, religion, race, color or political belief.

Cases of failure to explain decisions, delays in implementation of decisions or incorrect application of the law, and cases where false or misleading information is given.

Cases of intervention in the jurisdiction of the Judicial Authority and non-compliance with its rulings.

Means used by the Commission in following up on complaints

The means and methods used by the Commission to follow up on citizens' complaints vary with the aim of reaching the desired outcomes and solutions from the official civil or security parties, through:

A. Field investigation and follow-up:

The Commission held many meetings with officials and conducted field visits to official and semi-official locations and institutions throughout the year.

B. Written correspondence

Written correspondence comes at the second stage of the follow-up.

The correspondence reflects the citizen's demands, as examples the ICHR has sent 2016 letters and received 818.

C. Hearings:

The goal behind organizing hearings is to raise an issue that is the subject matter in the media by inviting the head of the party responsible for the violation, asking him about the violation and listening to his opinion in the presence of the relevant stakeholders while discussing the subject in a public manner.

A hearing with officials from the Ministry of Health and the General Personnel Council to resolve the issue of lack of recognition by the General Personnel Council of 75 employees of the Abu Rayya rehabilitation center

Obstacles facing the Commission while following up on complaints

★ The on-going situation of political division which resulted in the existence of two governments in both the West Bank and the Gaza Strip as a consequence of the events that took place in mid 2007, created some difficulties or even, in some cases, failure in determining the party responsible for the violations.

★ Although the commission receives large number of responses in 2009, the majority of these responses, particularly those received from security agencies, did not go beyond the typical standard responses, and continued to

deny the information provided in the complaints without taking any neutral or serious procedures or investigations in their regard.

★ In some cases, the official parties are not fully aware of the Commission's role, leading to their lack of cooperation with the Commission

Major violations according to the complaints received

Complaints may relate to one or more violations of any of the human rights and freedoms at the same time. Given the prevailing conditions and the political divisions between the West Bank and the Gaza Strip, the violations committed against Palestinian citizens continued during 2009, as was the case from 2007 .During 2009, citizens' rights of personal freedom were violated in both the West Bank and the Gaza Strip through political and arbitrary arrests.

1. Complaints about the violation of the right to humane treatment and about torture during detention

2. Citizens' complaints in terms of violations of the right to fair legal procedures (and about arbitrary arrest on political grounds

3. Complaints regarding the violation of rights associated with the public service and the right to work

4. Complaints regarding the violation of the right to peaceful assembly and society.

5. Complaints regarding violations of the right to health care.

FINAL REPORT

Final report of the First AOM Training Course

Rabat 25th and 26th of March, 2010

“Complaint Processing: Study and Follow-up”

I. General context of the training course :

- Within the framework of cooperation and exchange of experience between the institution Diwan Al Madhalim and the Association of Mediterranean Ombudsmen (AOM);

- In application of the action plan of the Association of Mediterranean Ombudsmen decided on by the General Assembly in Athens during the third meeting in December 15th, 2009;

- In accordance with the training agenda of the association for 2010

The first training session for ombudsmen’s collaborators, members of the Association of Mediterranean Ombudsman AOM, was organized in Rabat on the 25th and 26th of March on the theme of “Complaint Processing: Study and Follow-up”.

Twenty participants and collaborators of mediators and ombudsmen, National Institutions of Human Rights, members of the Association of Mediterranean Ombudsmen were present during this training session. Institutions attending this training course were from:

- Defender of the People, Spain;
- Institution of the French Mediator, France;
- Office of the Ombudsman, Malta;
- Human Rights Protector, Republic of Serbia;
- Raonador Del Ciutadà, Andorran Ombudsman, Andorra;
- Center for Professional Mediation (Saint Joseph University), Lebanon;
- Independent Commission for Human Rights, Palestine;
- Human Rights Presidency, Turkey;
- National Advisory Commission for the Promotion and Protection of Human Rights, Algeria.
- The Human Rights Ombudsman, Bosnia Herzegovina.
- Institution of Diwan Al Madhalim, Kingdom of Morocco

II. Objectives:

The objectives of this training session are:

- 1) To help Ombudsmen's collaborators acquire methodological tools and common references in order to promote the spread of public service culture and its code of ethics;
- 2) To strengthen the skills of collaborators of mediators and ombudsmen
- 3) To exchange at best experiences and expertise and know-how for every institution in the field of mediation.
- 4) To contribute in the promotion and spread of good governance in ombudsmen institutions members of the Association of Mediterranean Ombudsmen

III. Expected results

- 1- Training Coaches in mediation field
- 2- Working according fixed referentials
- 3- Creating a common database set for the collaborators of mediators, ombudsmen and members of National Institutions of Human Rights

IV. Opening ceremony of the training course:

The opening ceremony started with a speech given by Wali Al Madhalim in which he recalled the context of the creation of the association and the "Rabat's Declaration", the common heritage of the Mediterranean space between both shores regarding National Human Rights Institutions, Ombudsmen and Mediators. He pointed out also the choice of the subject "Complaint Processing: Study and Follow-up" and its two level approaches, one among which the diversity of the participants that created richness and uniqueness of this training experience.

Ms. Maria Del Mar España, General Secretary of the Defender of the People, Spain and appointed coordinator of the session presented in her turn the objectives of this first training course. She stated that these workshops are an important step to consolidate it. Representing eleven countries, these aims at reinforcing the dialogue between North/South, East/West, exchanging experiences and best practices, improving ombudsmen's work and teaching mediation techniques among each other. Through shaping and changing the used public

administrations ombudsmen, such institutions would give back confidence into citizens for living in democratic states.

V. Contents of the training course:

The training course was done in six modules, where theories concepts and comparisons in processing, studying and analyzing complaints were tackled. Based on ombudsmen, Human Rights National Institutions experiences, practical cases were shared and studied.

The first session on the theme of “Ways of complaints handling and admissibility” was presented by Dr Ivan Mifsud, Senior Investigating Officer at the Office of the Ombudsman of Malta.

During this session Dr. Ivan Mifsud put his concern in what takes into practice to carry a good investigation whether one’s in the capacity of the Ombudsman or as an investigating officer. Regarding the position of the ombudsman, he must master organisation skills, good command of language tools, communication, should have broad knowledge on law, policies, doctrines, and possesses large and eclectic education and finally be a patient person. Dr. Mifsud also presented and detailed about the methodology used in complaints handling.

The second session about “Addressing complaints and tools of mediation” was presented by: Ms. Najoua ACHERGUI, Officer in the Section of Studies, research and Follow-up, Diwan Al Madhalim, Morocco.

Ms. Najoua Achergui who presented the difference existing between Mediators and ombudsmen institutions. In fact Diwan Al Madhalim is a unique combination between both of these. Ms. Achergui moved to the conditions of admissibility of complaints, which could be brought against a decision or act of the state governments. Complaints should respond to a certain number of formal requirements established by law. In her third part, she explained how to mediate, in the case of Diwan Al Madhalim, on the basis of a two distinct techniques for handling complaints.

The third session related to “Study of complaints, follow-up and settlement requests” was presented by Mr. Rafael Muguruza, Advisor in the office of the Defender of Spanish people.

According to Mr. Rafael Muguruza the Defender of the People of Spain, which is mandated by the parliament, has to protect fundamental rights and monitors administration bodies. As a strongly decentralized country, Spain is managed through three levels of supervisions as far as autonomous regions are concerned. That is why the Defender of the People of Spain collaborates and cooperates with regional/autonomous ombudsman especially

in dealing with complaints that involve the same administrative body. Mr. MUGURUZA gave larger details on complaints causes of non-admission formal and material ones and solved the steps of investigation during complaint processing. Finally, he mentioned the different types of final resolutions in Spain and highlighted the difference between the “executive” authority and the “suggestive” one.

The fourth session concerned “Practical cases” and was jointly presented by Dr Ivan Mifsud, Senior Investigating Officer by the Office of the Ombudsman of Malta and by Ms. Najoua ACHERGUI, Officer in the Section of Studies, Research and Follow-up, Diwan Al Madhalim, Morocco.

Dr. Mifsud sought to illustrate three distinct, yet inter-related facets of the Ombudsman:

1. the Ombudsman as upholder of Fundamental Human Rights, namely Civil Rights;
2. the Ombudsman championing principles of good governance; and
3. the Ombudsman as an alternative mean of redress to the Courts.

Ms. Najoua Achergui gave examples about the different cases of reports:

1. Positive reports from the administration
2. Communication reports
3. Negative reports

Ms. Achergui tackled last but not least the case of amicable settlement.

The fifth session that talks about “The relationship between the Ombudsman and the administration” was presented by Mr. Christian Le Roux, director of Cabinet of the French Mediator.

Mr. Le Roux insisted on the role of the Ombudsmen in fostering the role of good administration and effective access to rights, with a special consideration to people in need and most vulnerable ones. He discussed also the essence of mediation that warrants concrete access to rights, through recreating the social link, fighting against corruption and promoting ethics in the administration. Different types of mediations were also revealed. According to Mr. Le Roux not only the Ombudsman should work effectively through the maintenance of a good relationship based on communication but he should also work on active listening when dealing with the citizen. He insisted on treating in a special manner the complaint, because each complaint handled represents a life.

During the sixth session, Ms. Maria Del Mar España, General Secretary of the Defender of the People of Spain, gave a presentation on “The Ombudsman Institution in the 21st century. New technologies and the new ways to communicate”. This presentation was followed by a discussion on “The exchange of experiences and know-how” between all participants.

According to the General Secretary of the Defender of the People of Spain, information communication technologies (ICTs) such as internet, online platforms, are the future of knowledge and the widespread of Culture. ICTs should be common usage in the public sector and among Human Rights institutions for an upraising of people’s awareness about their rights. The general secretary suggested three quick steps to implement in the everyday ombudsman’s work: communication through the intelligent management of information, inter-relationships with the citizens and specific tools for awareness. The most efficient example is that of the Defender of the People of Spain which spreads its mission and goals through an online website for children called the ‘Ombudsman in Class’. Internet can also enhance the role of the Ombudsman via socializing network like ‘facebook’.

The exchange of experience and know-how was approached positively from participants. These asked many questions and had many remarks. One of which was the nature of the concern of the ombudsman and its relationship with the National Institutions of Human Rights and their role in protecting economic and civil rights. Some pointed out that moral authority given to the mediator of the ombudsman and how it enforces mediation tools for solving conflicts between powerless citizens and powerful administration. Also were tackled essential rights to watch over the administration and essential conditions for effective mediation.

Other points revealed the impartiality of the ombudsman and the Mediator that consists mainly in confidence and dialogue. Also it is far away from representing political activity; it raises actually awareness

For the administration and the citizen, it stands on respect aside with neutrality regarding philosophy belief or anything.

Concerning pressure means, participants raised up the question of the power of recommendations that reports the mediator or the ombudsman to which commits the administration. Also, participants insisted on the role of the media and the press in general in pressuring the administration which serves in fact the standing of the ombudsman and

mediator. Role of ombudsmen was tackled, international and regional mediation offices. Also the Palestinian part did a presentation.

VI. Questionnaires Evaluation

The participants suggested

- **To extend the duration of the training course**
- **To involve more countries for participation**
- **To avoid being out of the chosen subject**
- **To send experts to other institutions for coaching**

VII. Closing ceremony of the training course:

The course was closed by a speech where Wali Al Madhalim expressed all the proud in the quality and hard work of the collaborators during these work sessions. He insisted on the role of communication in mediation field and prised the commitment of the attending members to spread the culture of mediation. He pointed out that the real strengths of such an event lies in the diversity of its members that bring experience expertise and know how in order to alleviate social iniquities and spread justice rule of law and good governance along the public sphere.

At the end of the closing ceremony, training certificates were distributed to all of the attending participants.

QUESTIONNAIRE

CENTER FOR TRAINING AND EXCHANGE ON MEDIATION
FIRST TRAINING SESSION FOR THE OMBUDSMEN COLLABORATORS
MEMBERS OF THE ASSOCIATION OF MEDITERRANEAN OMBUDSMEN

UNDER THE THEME:

« COMPLAINT PROCESSING: STUDY AND FOLLOW-UP »

Rabat, 25th and 26th of March 2010

First Name:

:

Last Name :

:

Institution :

:

N.B. Check the correspondent cell according to your choice ضع علامة في الخانة الموافقة
لاختيارك

Choice of the session theme اختيار موضوع الدورة	Insufficient ضعيف	Sufficient	Excellent ز
Content of the training modules			
Duration of the training مدة التكوين			
Skills of experts			
Data and Visual aids الدعائم البيداغوجية			
Conditions and organization التنظيم			
Session running and coordination التنسيق			

Other comments

ملاحظات إضافية

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Suggestions

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Rabat: March 25th & 26th, 2010

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